

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

ORIGINAL

77-4182

To be argued by
SAUL G. KRAMER

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

YESHIVA UNIVERSITY,

Respondent,

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Intervenor.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF ON BEHALF OF RESPONDENT

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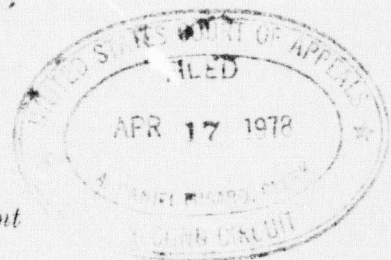




TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	
POINT I - All Full-time and Regular Half-time Faculty of the University Are Managerial and/or Supervisory Employees	15
A. The Managerial and Supervisory Powers Exercised by the University's Faculty	16
B. The Explicit Language of the Act and Applicable Judicial Decisions Mandate the Exclusion of All Faculty	30
POINT II - All Department Chairmen and Their Concomitants are Managerial and/or Supervisory Employees	44
A. The Supervisory and Managerial Powers of Department Chairmen	44
B. The Act Compels the Exclusion of All Chairmen as Managerial and/or Super- visory Employees	59
POINT III - All Members of the University Faculty Review Committee and Other Faculty With Special Administrative Roles Are Man- agerial and/or Supervisory Employees	66
A. The University Faculty Review Committee	66
B. The Committee on Academic Priorities and Resource Allocation	68

	<u>Page</u>
C. The Assistant Dean of the Belfer School, Charles Patt	69
D. The Board Has Improperly Disregarded Supervision of Out-of-Unit Personnel	71
 POINT IV - The Board's Treatment of Regular Half-time Faculty Amounted to De Facto Rule Making Without Affording the Due Process Requirements of the Administrative Procedure Act	 76
 POINT V - All Faculty Who Resigned, Retired or Were Terminated Before the Election Was Ordered Should Be Excluded	 87
 CONCLUSION	 90

TABLE OF AUTHORITIES

Cases:

<u>Adelphi University</u> , 195 NLRB 639 (1972)	71, 73, 74
<u>American Oil Company</u> , 155 NLRB 46 (1965)	73
<u>Arizona Public Service Co. v. NLRB</u> , 453 F.2d 228 (9th Cir. 1971)	31, 32, 67, 73
<u>Boston University v. NLRB</u> , Nos. 77-1143, 1226 and 1365 (1st Cir., April 13, 1978)	45, 72, 83
<u>Brookings Plywood Corp.</u> , 98 NLRB 794 (1952)	41
<u>C. W. Post Center of Long Island University</u> , 189 NLRB 904, (1971)	39
<u>Catholic University</u> , 201 NLRB 929, 205 NLRB 130 (1973)	12, 76, 80

Cases:Page

<u>Columbia Music & Electronics, Inc.,</u> 196 NLRB 388 (1972)	76
<u>Cornell University, 183 NLRB 329 (1970)</u>	3
<u>Daily Mirror, Inc., 5 NLRB 362 (1938)</u>	76
<u>Deaton Truck Line, Inc. v. NLRB, 337 F.2d</u> 697 (5th Cir. 1964), <u>cert. denied</u> , 381 U.S. 903 (1965)	5, 42, 43, 62
<u>Eastern Greyhound Lines v. NLRB,</u> 337 F.2d 84 (6th Cir. 1964)	37, 55, 60
<u>Fairleigh Dickinson University, 205</u> NLRB 673 (1973)	80
<u>Florida Southern College, 196 NLRB</u> 888 (1972)	40, 68
<u>GAF Corp. v. NLRB, 524 F.2d</u> 492 (5th Cir. 1975)	31
<u>General Dynamics Corp., Convair Aerospace</u> <u>Division, 213 NLRB 851 (1974)</u>	34, 39
<u>General Telephone Co. of Michigan,</u> 112 NLRB 46 (1955)	35, 55
<u>George Junior Republic, 224 NLRB 1581 (1976)</u>	76
<u>Great Atlantic and Pacific Tea Co., Inc.,</u> 128 NLRB 342 (1960)	76
<u>Greater Western Sugar Co., 137 NLRB 551 (1962)</u>	75
<u>Kendall College, 228 NLRB 126 (1977),</u> <u>enf'd (No. 77-1418) (7th Cir.,</u> <u>February 17, 1978)</u>	80
<u>Krambo Food Stores, Inc., 36 NLRB 369 (1957)</u>	76
<u>Manhattan College, 195 NLRB 65 (1972)</u>	12, 76
<u>New York University, 205 NLRB 4 (1973)</u>	12, 13, 74, 76-85, 88

Cases:

Page

<u>NLRB v. Bell Aerospace Co. Div. of</u> <u>Textron, Inc., 416 U.S. 267 (1974)</u>	32, 38, 75, 78
<u>NLRB v. Detroit Edison Co., 537 F.2d</u> <u>239 (6th Cir. 1976)</u>	31, 32
<u>NLRB v. Edward G. Budd Mfg. Co., 169 F.2d</u> <u>571 (6th Cir. 1948), cert. denied, 335 U.S.</u> <u>908 (1949)</u>	32
<u>NLRB v. Esquire, Inc., 222 F.2d</u> <u>253 (7th Cir. 1955)</u>	31
<u>NLRB v. Fullerton Publishing Co.,</u> <u>283 F.2d 545 (9th Cir. 1960)</u>	73
<u>NLRB v. Gary Aircraft Corp., 368 F.2d</u> <u>223 (5th Cir. 1966), cert. denied,</u> <u>387 U.S. 918 (1967)</u>	36
<u>NLRB v. Gray Line Tours, Inc., 461 F.2d</u> <u>763 (9th Cir. 1972)</u>	31, 32, 35, 67
<u>NLRB v. Leland - Gifford Co., 200 F.2d 620</u> <u>(1st Cir. 1952)</u>	74
<u>NLRB v. Mercy College, 536 F.2d 544,</u> <u>(2d Cir. 1976)</u>	12, 72
<u>NLRB v. Metropolitan Life Insurance Co.,</u> <u>405 F.2d 1169 (2d Cir. 1968)</u>	8, 31, 32, 36, 90
<u>NLRB v. Metropolitan Petroleum Co., 506</u> <u>F.2d 616 (1st Cir. 1974)</u>	31
<u>NLRB v. Pilot Freight Carriers, Inc., 558</u> <u>F.2d 205 (4th Cir. 1977)</u>	31
<u>NLRB v. Roselon Southern, Inc., 382</u> <u>F.2d 245 (6th Cir. 1967)</u>	73
<u>NLRB v. Scott Paper Co., 440 F.2d 625</u> <u>(1st Cir. 1971)</u>	5, 42, 62
<u>NLRB v. Southern Airways Co., 290 F.2d 519</u> <u>(5th Cir. 1961)</u>	60

Cases:Page

<u>NLRB v. Wentworth Institute</u> , 515 F.2d 550 (1st Cir. 1975)	37
<u>Ohio Power Co. v. NLRB</u> , 176 F.2d 385 (6th Cir. 1949), <u>cert. denied</u> , 338 U.S. 899 (1949)	32, 67
<u>Packard Motor Car Co. v. NLRB</u> , 330 U.S. 485 (1947)	38
<u>Pittsburgh Plate Glass Co.</u> , 115 NLRB 976 (1956)	7, 35, 60
<u>Point Park College</u> , 209 NLRB 1064 (1974)	80
<u>Puget Sound Power & Light Co.</u> , 117 NLRB 1825 (1957)	34
<u>Red and White Airway Cab Co.</u> , 123 NLRB 83 (1959)	41
<u>Rensselaer Polytechnic Institute</u> , 218 NLRB 1435 (1975)	80
<u>Retail Clerks International Ass'n v. NLRB</u> , 366 F.2d 642 (D.C. Cir. 1966), <u>cert. denied</u> , 386 U.S. 1017 (1967)	33
<u>Russell S. Kribs Associates, Inc.</u> , 181 NLRB 1109 (1970)	44
<u>Sears Roebuck & Co.</u> , 172 NLRB 1266 (1968)	12, 76
<u>St. Luke's Episcopal Hospital</u> , 222 NLRB 674 (1976)	76
<u>Sida of Hawaii</u> , 191 NLRB 194 (1971)	41
<u>Sutter Community Hospitals</u> , 227 NLRB No. 18 (1977)	39
<u>Transformer Engineers</u> , 114 NLRB 1325 (1955)	8, 36
<u>Trustees of Columbia University</u> , 97 NLRB 424 (1951)	3

<u>Cases:</u>	<u>Page</u>
<u>Turner's Express, Inc. v. NLRB</u> , 456 F.2d 289 (4th Cir. 1972)	31
<u>University of Miami</u> , 213 NLRB 634 (1974)	80
<u>University of New Haven</u> , 190 NLRB 478 (1971) 12, 76,	79
<u>University of Vermont</u> , 223 NLRB 423 (1976)	80
<u>Viking of Minneapolis</u> , 171 NLRB 1155 (1968)	76
<u>Weather Seal Inc.</u> , 161 NLRB 1226 (1966)	44
<u>Weekly Publications, Inc.</u> , 8 NLRB 76 (1938)	76
<u>West Penn Power Co. v. NLRB</u> , 337 F.2d 993 (3d Cir. 1964)	73
<u>Western Saw Manufacturers, Inc.</u> , 155 NLRB 1323 (1965)	40
<u>Western Union Telegraph Co.</u> , 36 NLRB 881 (1941)	76
<u>Westinghouse Electric Corp.</u> , 163 NLRB 723 (1967), <u>enf'd</u> , 424 F.2d 1151 (7th Cir. 1970), <u>cert. denied</u> , 400 U.S. 831 (1970)	34, 74
<u>Whiting Corp.</u> , 99 NLRB 117 (1952)	88
<u>Wisconsin Bearing Co.</u> , 193 NLRB 249 (1971)	76
<u>Wisconsin River Valley District Council v. NLRB</u> , 532 F.2d 47 (7th Cir. 1976)	36, 55
 <u>Statutes:</u>	
<u>Administrative Procedure Act</u> , 5 U.S.C. 553 <u>et. seq.</u>	13, 78, 83
<u>National Labor Relations Act</u> , as amended §2(11), 29 U.S.C. §152(11)	<u>Passim</u>
§2(12), 29 U.S.C. §152(12)	35

OTHER AUTHORITIES

<u>Articles:</u>	<u>Page</u>
"Consensus Management at Graphic Controls", <u>Organizational Dynamics</u> 23 (Winter 1975)	40
Kahn, "The NLRB and Higher Education: The Failure of Policymaking Through Adjudication", 21 U.C.L.A. L. Rev. 63 (1973)	3
"Team Management and How It Works", Federal Home Loan Bank Board Journal (January 1977)	40
"Team Management: Are Two Heads Better Than One?", Savings and Loan News 48 (January 1977)	40

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BRIEF ON BEHALF OF RESPONDENT

STATEMENT OF THE ISSUES PRESENTED

1. Did the National Labor Relations Board (the "Board") improperly decide that the full-time faculty of the University are not managerial and/or supervisory employees within the meaning of the National Labor Relations Act?

2. Did the Board err, in any event, by its failure to exclude from the bargaining unit, as supervisory and/or managerial employees, department chairmen, members of the University Faculty

Review Committee and of the Committee on Academic Priorities and Resource Allocation, the Assistant Dean of the Belfer Graduate School, and the Chairmen of the Admissions and Doctoral Committees at the Wurzweiler School?

3. Did the Board err when it failed to include all regular half-time faculty in the unit which the Board eventually found to be appropriate?

4. Did the Board improperly include in the bargaining unit faculty whose employment at the University was to terminate at or before the end of the academic year in which the election was held?

STATEMENT OF THE CASE

On December 5, 1975, a three-member panel of the Board issued the decision and direction of election that gave rise to this proceeding (A.1). The panel upheld the University's argument that the school's 28 principal investigators (faculty who administer research and training grants) were supervisory employees excluded from coverage of the Act, but failed to accept its position that all full-time faculty exercise such substantial authority in the personnel and other areas of the University's governance as to mandate their exclusion from the unit, and that, in any event, department chairmen and other faculty with special administrative roles must be excluded. Finally, the panel included terminal faculty in the bargaining unit, while excluding regular part-time faculty.

The Board has petitioned to enforce its order to require the University to recognize the Yeshiva University Faculty Association (the "Union") as the exclusive bargaining agent of a unit of the University's full-time faculty members. We submit that the Court should deny enforcement of the Board's order because, as we demonstrate below, the Board's underlying decision is directly contrary to the express language of the Act, as well as well-settled interpretations of that Act by this and other courts, and is, moreover, not supported by the record of this case.

For almost 20 years (from 1951 to 1970) the Board adhered to a policy of refusing to assert jurisdiction over private nonprofit institutions of higher education.* Since 1970, however, it has chosen to assert jurisdiction and, thus, to attempt to apply the National Act (a statute with roots in the industrial world where sharp divisions frequently separate managers from employees and supervisors from workers) to the world of academe where various concepts of shared authority in terms of management and supervision are often traditional. See, e.g., Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 U.C.L.A. L. Rev. 63 (1973).

Yeshiva University has not contested, nor does it now

* See, Trustees of Columbia University, 97 NLRB 424 (1951); compare, Cornell University, 183 NLRB 329 (1970).

attack, the Board's right to assert jurisdiction over institutions of higher learning after two decades of abstention. Nor do we seek (as do the amici of the Board) to have this Court establish broad unit inclusion and exclusion concepts.

Rather, we are here on the record of this case and no other -- a record that shows, based largely on uncontroverted evidence, that a pervasive system of shared management and supervision exists at Yeshiva, and that the members of our full-time faculty must be treated as supervisory and/or managerial personnel and, thus, excluded from the unit. The Board has, for the most part, ignored this record and included all faculty, including chairmen and their concomitants.

In the process, the Board has approved supervisory ratios of as high as 118 to 1 at Yeshiva College where one dean (who earns less than many of that school's faculty and also teaches in excess of the normal full-time faculty load) is the only "administrator" left out of the unit.* It has reached this anomolous result on the strained rationale that shared management and supervision is neither managerial nor supervisory because it is subject to the ultimate authority

* As we show in Point II below, other schools at the University's four widely separated campuses have, if chairmen are not supervisors, comparably high supervisory ratios. See, e.g., Stern College's 80 to 1, Erna Michael's 38 to 1, Belfer's 41 to 1 and Ferkauf's 58 to 1. These ratios include both full and part-time faculty.

of a Board of Trustees and President, and is somehow not in the interest of the University (i.e., the "employer") because it is also in the interest of the faculty (i.e., the "employees"). Compare, Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697 (1964), cert. denied 381 U.S. 903 (1965), and NLRB v. Scott Paper Company, 440 F.2d 625 (1971), in which the Fifth and First Circuits held that supervisory authority may be exercised in the interest of both the employer and employees.

In short, what has occurred here is that the managerial and supervisory functions of our faculty (established for the most part by uncontroverted evidence) have been ignored and that a union-management matrix (a "we" - "they" dichotomy derived from the industrial model) is being superimposed over the University's pre-existing shared governance structure. If the Board's determination is not reversed, Yeshiva University will, we submit, be forced to change its own basic governance structures, in essence, to conform with the Board's idea of who should be treated as supervisory or managerial in academe. By so doing, the Board's own misconceptions and predispositions about the facts of university life (certainly not supported by the evidence in this case) will, in essence, act as self-fulfilling prophecies.

More particularly, enforcement of the Board's order should be denied because:

1. While some managerial functions -- finances, for example -- are largely, although not entirely the province

of the administration, the record shows that the faculty of Yeshiva University is so significantly involved in the day-to-day management of the school as to be excluded as both supervisors and managers under any traditional statutory analysis. To illustrate:

* The faculty in the University's Belfer Graduate School of Science makes all decisions in the school regarding faculty hiring, promotions, tenure and termination (A.812-816, 820-821, 838-839, 849, 895-896).

* At Ferkauf, faculty committees make effective recommendations regarding tenure and promotion, while full-time hiring decisions (including faculty rank, and thus placement on the salary scale) are made by the faculty within each department (A.1169-1172, 1175-1177, 1186, 1189-1192).

* The acting dean at Wurzweiler has confirmed that the school's faculty have the authority to determine the school's "labor policy", by promulgating guidelines, binding on him, governing the school's hiring, promotion, tenure and termination policies (R.3566-3567; A.1004-1005, 1502).*

* A decision by the director of the Teachers Institute for Women to move the school to another location was voted down by the school's faculty meeting (A.733-736, 770-771).

* Portions of the transcript of the hearings not appearing in the appendix are cited in this brief as, for example, "R.111". Similarly, University and Union exhibits are cited as "Univ. Ex. 1" or "YUFA Ex. 1".

* A proposal by Wurzweiler's acting dean to raise tuition \$500 was reduced by the faculty to \$300, and the school's faculty, in order to generate additional income, increased the size of the student body (A.932-934).

* The dean of Yeshiva College is "very often" bound by faculty decisions with which he disagrees; the dean of Stern College was required to re-institute a major when the faculty disagreed with his decision to delete it; and once the faculty at Erna Michael College have reached a consensus the only role of the dean is "simply [to] carry out the mandate of the faculty" (A.282-283, 418, 588).

Yeshiva's faculty, moreover, have substantial control over the nature and content of curriculum, i.e., the "product" of the University (see, e.g., A.280-283, 421-423, 427, 810-811, 825, 1146-1147). They largely determine the size of the respective schools' student bodies, i.e., the number of "customers" who will be serviced by the University (see, e.g., A.278-280, 283-285, 429, 556-557, 583, 845, 933-934). Their role in setting tuition rates, i.e., the "price" to be charged to offset the cost of the educational product, is demonstrated in the record (see, e.g., A.592-593, 932-933, 1183).

If such managerial and supervisory authority were exercised by persons similarly situated in the industrial sector the Board would not hesitate to exclude them as managerial or supervisory employees. See, e.g., Pittsburgh Plate Glass Co., 115 NLRB

976, 977 (1956) (laboratory assistants held to be supervisors because, despite independent investigation by higher management officials, advice on hiring given "substantial weight" by management); Transformer Engineers, 114 NLRB 1325, 1327 (1955) (exclusion of leadladies because foremen gave "great weight" to their opinions about employee performance). The Board, however, has refused to apply traditional statutory standards to determine the managerial and supervisory status of members of university faculties. Rather, it has constructed novel rules -- such as the "ultimate authority" doctrine -- which are directly contrary to the language of the Act, and which are apparently applied only to faculty.* As we show below, these rules cannot withstand judicial review (see, Point I at pp. 15-43, infra).

2. Although there is variation from school to school in the authority exercised by department chairmen, the proof here establishes that all Yeshiva department chairmen and their concomitants**, in addition to acting as first-level administrators, possess as chairmen (separate and apart from their roles as

* The "ultimate authority" doctrine, for example, under which university faculty are held by the Board not to be supervisors because ultimate legal authority within a university rests with the president and trustees, is directly contrary to the explicit language of the Act. As this Court held in NLRB v. Metropolitan Life Insurance Co., 405 F.2d 1169, 1177 (1968), Section 2(11) of the Act requires only that a supervisor possess authority "effectively to recommend" actions, not that he be empowered to put those actions into effect himself.

** Department chairmen include "senior professors" and "division chairmen" at Yeshiva College and "senior professors" at Erna Michael College.

faculty members), one or more of the Act's criteria of supervisory status and, thus, are supervisors within the meaning of the Act.

For example, the testimony of the deans of the Stern College for Women and of Yeshiva College (which between them contain over half of the chairmen in the University) details the determinative role played by chairmen -- acting as administrators and not representing the faculty of their departments -- in personnel decisions in those schools. Thus, Dean Mirsky's entirely uncontroverted testimony documents that Stern department chairmen, who are appointed by the dean without consulting the faculty and who receive a remission of one-quarter of the normal teaching load for "administrative services" rendered to the college, make effective recommendations regarding hiring, termination, promotion and tenure for the school's faculty (A.286-287, 311-313, 315-318, 324-330, 360-363).

Dean Bacon's testimony, which was not controverted on the issues dealt with here, shows that department chairmen at Yeshiva College make effective recommendations regarding hiring, promotion, termination, the granting of sabbatical leaves, that they determine departmental budgets and that they play, in addition, a general managerial function within the school. The testimony, moreover, documents similar powers for the chairmen at the University's other schools (see, e.g., A.442-448, 450-456, 465-471, 512-514, 522-523, 599-603, 813-815, 830-836, 906).

Although the administration plays a formal role in these personnel decisions -- actual letters of appointment, for example, are issued by the President -- the record demonstrates that the role of the President and of the deans is for the most part routinely to ratify the recommendations of the chairmen. To illustrate:

* At Stern College, Yeshiva College, Erna Michael College and Revel, new faculty appointments are never made without approval of the chairman (A.313, 451-453, 601, 1107). At Yeshiva College, in fact, the dean has sustained the negative hiring recommendation of a department head over the objection of the University's academic vice president (A.451-453).

* Stern College's department chairmen, moreover, are solely responsible for faculty evaluation, and in the seven years David Mirsky has been the school's dean, only one termination decision by a department chairman has been overruled (A.316-322, 324-326, 387-389).

* All promotions recommendations made by the chairmen's Advisory Council at Yeshiva College, whether positive or negative, have been put into effect, even where the dean has opposed the council's recommendations. Similarly, no sabbatical recommendation made by the Advisory Council has ever been overruled (A.445-448).

In fact, if chairmen are not supervisors or managers the schools of this University are left with outrageously high super-

visory ratios of as high as 118 to 1. Given the record of this case, therefore, chairmen must be excluded (see, Point II at pp. 44-65, infra).

3. Like chairmen, other faculty exercise special managerial and supervisory authority mandating their exclusion from the unit. Thus, members of the University Faculty Review Committee possess the authority to make effective recommendations respecting any faculty grievance, including, for example, failure to be granted promotion or tenure (A.176-177, 1522-1525). The faculty members of the Committee on Academic Priorities and Resource Allocation possess broad managerial powers respecting the setting of academic and fiscal priorities for the University (A.590-598). The Assistant Dean of Belfer, Charles Patt, is charged with overseeing the administration by various faculty members of the school's millions of dollars of research grants (A.854-864).

Finally, the chairmen of the Admissions and Doctoral Committees at Wurzweiler play central roles in the administration of that school and, among other duties, regularly supervise their committees' secretaries (A.945-949, 957-962, 1039-1040). As we note in Point III, at pp. 66-76, infra, these chairmen are supervisors and managers. Further, as we point out there, this conclusion cannot be avoided with respect to those two chairmen (or with respect to departmental chairmen who exercise supervisory

authority over part-time faculty and departmental secretaries who are outside the unit) by application of the Board's so-called 50% out-of-unit management-supervisor rule. The propriety of that rule was attacked in this Court but not decided by it in NLRB v. Mercy College, 536 F.2d 544, 550 (1976), where Judge Feinberg termed the issue a "difficult" one particularly given "the additional complexity of applying terms from the ordinary industrial hierarchy to the university context."

4. Since 1938, the Board has recognized that part-time employees who work a "regular and substantial amount of time ... have a sufficient community interest with full-time employees" to require their inclusion in full-time bargaining units.* This principle was followed in all branches of the economy and, in fact, in early faculty union cases.**

In a three to two decision (with then Chairman Miller and current Chairman Fanning dissenting) the Board broke with this precedent of 35 years to announce in New York University, 205 NLRB 4 (1973), a new rule, applied only to faculty, that all non-tenure eligible part-time faculty would, thereafter, be excluded from full-time faculty units.

* See, Sears Roebuck & Co., 172 NLRB 1266 (1968), and the cases cited infra at p. 76.

** See, e.g., University of New Haven, 190 NLRB 478 (1971); Manhattan College, 195 NLRB 65 (1972); and Catholic University, 201 NLRB 929 (1973).

We submit that since the N.Y.U. decision the Board has, in fact, simply applied the N.Y.U. "rule" without examining the underlying facts of the actual cases before it. Certainly that is the case here where the Board ignored the community of interest shown on the record to exist between the University's regular half-time faculty and full-time faculty.

It is the University's position that the Board is precluded from denying the individual case-by-case factual consideration inherent in adjudication, while at the same time denying the due process protections of rule-making. Thus, the Board's application of an unwavering rule at Yeshiva -- without regard to the University's factual situation -- while also denying the alternative afforded by rule-making under the Administrative Procedure Act is invalid and must be reversed (see, Point IV at pp. 76-86 infra).

5. The Board included in the bargaining unit three categories of faculty whose employment at the University was to terminate at or before the end of the academic year in which the election was held: faculty who had decided to resign, who had been terminated or had reached retirement age.

These faculty, particularly those who have chosen to resign, could have no meaningful interest in the outcome of the election and, thus, should have been excluded. Instead, the

Board blindly followed the "industrial rule" that employment status on the "eligibility" and the election dates determines who will vote. This rule, which was established to eliminate the need for endless investigations into the future expectations of industrial employees, virtually none of whom hold contracts and who, unlike faculty members, do not normally receive or give any substantial advance notice of resignation, termination, or non-renewal, is plainly inappropriate at an institution such as Yeshiva.

As the University has documented and as the Union's own President has testified, a faculty member who resigns or is terminated will only rarely return to the University in the following academic year (A.1342-1344, 1607). Thus, the reason for the industrial rule, to avoid prolonged investigation into whether terminal employees will actually leave, simply does not exist here. On the contrary, the proof is that faculty who have resigned, retired or have been terminated will in fact leave the school and, thus, have no community of interest with the remaining faculty. The failure to adopt a rule appropriate to the university context -- the exclusion of all resigning, retiring and terminated faculty -- was plainly in error (see, Point V at pp. 87-90, infra).

ARGUMENT

POINT I

ALL FULL-TIME AND REGULAR HALF-TIME FACULTY OF THE UNIVERSITY ARE MANAGERIAL AND/OR SUPERVISORY EMPLOYEES.

Yeshiva University is a private institution of higher education chartered by the State of New York. It has approximately 225 full-time and 175 part-time faculty (of whom 24 are regular half-time faculty), and approximately 2,500 students. The University's five undergraduate schools and eight graduate schools are on four widely separated campuses in New York City: the Main Center (Washington Heights), the Graduate Center (Fifth Avenue), the Midtown Center (Lexington Avenue), and the Bronx Center.

Found at the Main Center are Yeshiva College, Erna Michael College, the James Striar School, the Bernard Revel School, Yeshiva Program and the Belfer Graduate School of Science. The Graduate Center houses the Ferkauf Graduate School of Humanities and Social Sciences, the Wurzweiler School of Social Work and the Benjamin Cardozo School of Law. Teachers Institute for Women and Stern College for Women are located at the Midtown Center. Finally, the Albert Einstein College of Medicine and the Sue Golding Graduate Division of Medical Sciences are at the Bronx Center.*

* As the bargaining unit does not include Albert Einstein College, the Sue Golding Division or the Benjamin Cardozo, School of Law, all references to Yeshiva University exclude those schools.

Yeshiva University has a self-perpetuating Board of Trustees, consisting (except for the President) of outside Trustees with no administrative position at the school outside their membership on the Board (see, Univ. Ex. 22A at p. 129). The University's chief executive officer is the President, and there are, in addition, three vice presidents: for student affairs, for business affairs, and for academic affairs (A.1660). An Executive Council of deans and administrators makes recommendations with respect to various matters to the President (A.66-67). A Faculty Handbook sets forth the University's stated policies regarding faculty appointments, promotion, tenure, termination and sabbaticals (A.1491, 1520).

A. The Managerial and Supervisory Powers Exercised by the University's Faculty.

1. Stern College for Women

The dean of this College, David Mirsky, who retains his faculty rank, gave uncontroverted testimony that the Stern faculty govern their own school. He views his responsibility as serving as the "educational leader" of the college and reporting to the President "on how the college is conducting itself" (A.265-266).

In determining the curriculum, for example, the dean's authority is directly subordinate to that of the chairmen, and ultimately subordinate to the authority of the faculty as a whole. The Curriculum Committee (composed entirely of the department

chairmen, Mirsky, and a representative of the Registrar's Office) must pass on all changes in graduation requirements and recommends to the faculty any programmatic changes (A.280-281). The only power of the dean to add new courses is a power delegated by the committee: if a department chairman and the dean agree that a course affects only one department, it can be added without the committee's approval (A.281). When, during the 1969-70 academic year, the faculty as a whole disagreed with a decision by the dean and the committee to delete the education major at Stern, the faculty required Mirsky to reinstitute it (A.282-283).

The Committee on Academic Standards both sets general standards and decides whether an individual student whose performance is inadequate will be required to leave the school. Although Mirsky recognizes that the latter decision results in a loss of tuition income, he has never overruled the committee (A.278-280). Similarly, the Admissions Committee both establishes admissions standards and decides on individual admissions (A.283-285).

An ad hoc Faculty Committee on Grade Distribution recommended a change in the school's grading system which was adopted by the faculty (A.291-294). The faculty, upon the recommendation of the Committee on Scheduling Patterns, introduced a new scheduling model for the school (A.295-297). The Committee on Personnel and Budget, formed as a response to the college's growing budgetary strictures, made generally effective recommenda-

tions which helped lead to elimination of elective courses, establishment of joint courses with graduate schools and changes in scheduling (A.300-305).

2. Yeshiva College

Isaac Bacon, who is also a professor of linguistics, has been dean of Yeshiva College since 1959 (A.403). His salary is smaller than that of other members of the college's faculty, and, at the time of the hearings, he taught a full-time load in excess of the normal 12 hours (A.518). Bacon's testimony was that the management of the college is entrusted to the faculty, with some student involvement (A.413).

The Yeshiva College Senate is composed of faculty, administration, student and alumni members, with control resting largely with the faculty (see, A.1571). The Senate Constitution provides that it has jurisdiction over standards, admissions policy, curriculum, degree requirements, policy on standards of scholastic performance, student attendance, the grading system and academic honors. All measures passed by the Senate may be vetoed by the Faculty Assembly (A.1572).

Under the college's Faculty Statute, the final authority to legislate on all the matters detailed above rests with its faculty (A.1528). Dean Bacon testified that the Faculty Assembly may "definitely" direct action which is binding upon Bacon as dean

(A.417). Bacon, for example, "very often" votes against measures in the Senate. However, once such measures are passed by the Senate and not vetoed by the faculty, Bacon feels that he must see to it that they are executed (A.418).

During Bacon's sixteen years as dean, the President has never vetoed an action of the Senate or Faculty Assembly (A.420). On one occasion during those years, the President asked the Senate to reconsider a measure, and the Senate left the measure unenacted (A.420). The dean has no veto over decisions of the Senate nor of the Faculty Assembly (A.417-420).

A third part of the school's governance mechanism consists of faculty committees. Thus, the Scholastic Standing Committee makes all decisions on probation and academic dismissal for students, handles all requests for early graduation, for honors projects and for independent studies, and has recently been directed by the Faculty Assembly to study and recommend changes in the grading system (A.427-429, 438-439).

Authority to introduce new courses at the college is shared between the Curriculum Committee, the faculty and the affected division (A.421-424). Bacon's only curriculum authority, which in any event comes from the faculty, is to introduce new courses for one term on an experimental basis (A.424). While Bacon often tries to convince the faculty to institute new courses, his role is solely to make suggestions (A.421-422; R.4225-4227).

3. Erna Michael College

Erna Michael College provides men with undergraduate training for teaching or administrative careers in Hebrew and Jewish studies. Since 1958 its dean has been Jacob Rabinowitz, whose uncontroverted testimony shows that (except in the hiring, evaluation, and termination areas where department chairmen play the leading role, see, p. infra) the school is governed by consensus of the faculty (A.534-536, 588).^{*} Once a consensus has been reached, his role is "simply [to] carry out the mandate of the faculty" (A.588).

The governing body at Erna Michael is the Faculty Meeting. Subjects handled at Faculty Meetings have included admissions procedures, curricular matters, grading, attendance, scheduling and the academic calendar (A.542, 545-546). The Faculty Meeting has carried out a basic restructuring of the college in which the number of hours required to be completed by students was substantially reduced. As a result, faculty teach fewer hours and teach three instead of at least four days a week (A.543-545). Similarly, the faculty has made the decision to drop courses, causing a part-time faculty member to leave the school (A.583-584).

Rabinowitz regards himself as bound when the faculty makes decisions with which he disagrees -- for example, in refus-

^{*} When Rabinowitz testified in the fall of 1974 he was teaching six hours a week (A.536).

ing to institute a trimester academic calendar and in making changes in the grading system (A.547-549). Neither Rabinowitz nor any other member of the administration has ever vetoed a decision of the faculty (A.549).

Finally, governance is carried out by means of committee meetings. Thus, the Admissions Committee established the criteria and procedures for student admissions (A.556-557). Dean Rabinowitz, for example, testified that when the Admissions Committee decided to institute an entrance examination: "The Committee made that proposal, they set up a group which would make up the examination, and I'm left with the job of administering it" (A.557).

4. James Striar School of General Jewish Studies

James Striar is another undergraduate school of Jewish studies, providing programs for men with little background in the area. Its director, Rabbi Morris Besdin, teaches a full-time load (A.656-657).

His uncontroverted testimony was that faculty meetings are "in a great sense decisive as to the direction of the school" (A.666). Subjects covered may include courses, curriculum, administrative regulations, absences, testing and methods of teaching (A.666). In one instance, where the Student Faculty Committee made a recommendation contrary to that of Besdin regarding the school's guidance system, the faculty "overruled" Besdin

(A.668-671). Indeed, Besdin could not recall a time when he overruled a recommendation of the faculty (A.674).

5. Yeshiva Program

The third of the men's undergraduate Jewish studies schools is the Yeshiva Program. It provides a program of study in Talmudic texts. Faculty at the Yeshiva Program have no traditional faculty rank; instead, they are designated "rosh yeshiva", which means, literally, "head of yeshiva" (A.1075).

Rabbi Zevulun Charlop has been the school's director since 1971, and prior to that time, he taught at the University. Rabbi Charlop's testimony was not controverted. He stated that in any given year, the same course is taught by all members of the faculty. The choice of that course is made by consensus of the faculty, as are all other decisions at the school. For example, the faculty decided to extend the academic calendar by approximately two weeks, and this decision was put into effect (A.1061, 1073-1075).

6. Teachers Institute for Women

The final undergraduate school is the Teachers Institute for Women, which prepares women for positions as teachers of Hebrew literature, language and culture. There are no faculty ranks -- all faculty members are "instructors". There are no department chairmen or senior professors (A.722-723).

Teachers Institute's director, Rabbi Faivelson, emphasized in his uncontroverted testimony that "the faculty is the school" (A.732). His testimony showed that the faculty have made effective recommendations regarding the location of the school, what instructors should be terminated, the curriculum, degree requirements, admissions and faculty hiring (A.733-737, 753-756, 768-771, 775).

According to Rabbi Faivelson, the faculty does the hiring. When the need to hire an additional member of the faculty arises, all members of the faculty are asked to make recommendations to Faivelson. The director then asks the faculty if they have any objection to the applicants. Faivelson testified that no applicant is hired if there is "the slightest objection, even on one faculty member's part" (A.768-770). Correlatively, Rabbi Faivelson described an instance where, for budgetary reasons, he favored the termination of a part-time faculty member. The faculty voted against the termination and the faculty member was in fact retained (A.753-756).

Rabbi Faivelson recommended that Teachers Institute be moved to Brooklyn in order to attract better students. The faculty meeting, however, rejected the proposal, determining that the school would remain in Manhattan (A.733-734, 736).

7. Belfer Graduate School of Science

The Belfer Graduate School offers courses in chemistry, mathematics and physics.

Arthur Komar became Belfer's dean in 1968 after the school's faculty successfully petitioned for the removal of Komar's predecessor. Thereafter, Komar was elected acting dean by the faculty, and he obtained a vote of approval from the faculty before accepting a permanent appointment as dean (A.792-797, 1453-1454). Komar, who was teaching one course at Belfer when he testified, viewed his position as dean as "first among equals" (A.790-791, 820).

The Faculty Council is the "principal governing body" of the school, dealing with curriculum, size of departments, fringe benefits, formation of new departments and the financial status and wage policy of the school (A.810-811). Governance is also carried out by faculty committees. The Library Committee, for example, makes recommendations regarding library budget priorities which are always accepted (A.811-812).

The bulk, though, of faculty governance is handled by the school's departments.

Thus, the hiring of full-time faculty is decided by a vote of the department, and part-time hiring is determined by the

department by consensus (A.812-814, 849).* Komar's only role in hiring is merely as one member of the Physics Department, where he participates just as any other member of the faculty (A.820-821). The length of an appointment is also decided within the department by consensus (A.816).

Decisions on promotion, nonrenewal of faculty appointments and tenure are also made within each department by consensus. Komar stated that he does not have the right to require the retention of a faculty member the department decides not to renew or to veto a department's tenure decision (A.838-839, 895-896).

Similarly, each department determines its own curriculum, who should teach each course, student admissions standards, which individual applicants to admit, makes grants of student aid and evaluates students (A.825-827, 840-843, 845).

8. Bernard Revel Graduate School and Harry Fischel School for Higher Jewish Studies

Bernard Revel is a graduate school of Jewish studies.** At the time of the hearing there was no permanent dean at Revel. Leo Landman, the Secretary of the Faculty, handled the day-to-day running of the school, and did so even when there was a dean

* The salary for new full and part-time faculty is effectively determined by the chairmen, see, p. 54 infra.

** The Harry Fischel School is Revel's summer school. As the faculty of the two schools is the same, all references in this brief to Revel include Harry Fischel.

(A.1112). At the time Landman testified he was teaching two courses (A.1048).

Dr. Landman's uncontroverted testimony establishes that the faculty is Revel's final decision-making body on most matters. Decisions are made at faculty meetings by consensus, and once a consensus has been reached on curriculum matters, admissions requirements, degree requirements, or the introduction of new courses, the faculty's decision is generally given effect (A.1098, 1101-1103).

9. Ferkauf Graduate School of Humanities and Social Sciences

Joseph Gittler has been dean of Ferkauf since 1966. He is a member of the faculty and had last taught a course in the fall immediately prior to his testimony (A.1136-1137). His testimony was for the most part uncontroverted.

Dean Gittler stated that the principal governing body of the school is the faculty as a whole (A.1144). Thus, faculty meetings act on adoption of major changes in programs, the basic standards of the school, degree requirements, curriculum questions and changes in criteria for promotion (A.1146-1147).

Much of the school's governance is carried out by faculty committees. The Promotions Committee, for example, effectively determines questions of faculty promotions. Under

the Ferkauf Faculty By-Laws, a negative recommendation by the committee is final except for review by the University Faculty Review Committee (see, YUFA Ex. 6 - Appendix A, p. 4). In fact, a promotion has never been made in the face of a negative committee decision (A.1171-1172). Out of approximately eighteen positive recommendations made during Gittler's nine years as dean, only one promotion was not actually made (A.1169-1171).

Questions of tenure are effectively decided by the Council on Tenure, which consists of all the school's tenured faculty (A.1186). Neither Dean Gittler nor the administration have ever reversed a negative tenure decision of the council (A.1191). Only once has a positive recommendation of the council not resulted in tenure. In that case the council's vote was close, and when the department reconsidered the question, a majority of its faculty either voted against tenure or abstained (A.1189-1190).

In addition to the faculty meeting and faculty committees, Ferkauf faculty handle governance responsibilities through their departments. For example, full-time faculty hiring decisions are effectively made by the faculty of a department. Indeed, Dean Gittler accepts "ninety-eight percent" of faculty appointments recommended by departments, and the administration has never vetoed an appointment (A.1176-1177). The rank of new appointees, and thus placement on the salary scale, is also decided by the department (A.1175).

10. Wurzweiler School of Social Work

The acting dean of Wurzweiler is Solomon Green, who retains his faculty rank and, at the time he testified, was teaching two courses. His testimony was uncontroverted.

Dr. Green testified that "the internal operation of the school has been heavily governed by faculty decisions". He explained that, "[T]he primary way the faculty makes its desires and will felt is at faculty meetings" (A.927). These meetings are often concerned with curriculum matters, an area in which the faculty has been the final decision-making body (A.930).

The faculty also makes important budgetary decisions. Thus, when it was necessary to generate additional income, the faculty made the decision to increase the size of the student body (A.933-934). Similarly, when Dean Green proposed a \$500 tuition increase, the faculty reduced the increase to \$300 (A.932-933).

Dismissal of students for academic insufficiency is decided by vote of the faculty. Again, such a decision has a financial impact on the school through the loss of tuition income (A.931-932).

Other faculty governance functions are carried out by means of faculty committees. Thus, a committee monitors the work of the school's community social work program to ensure that it meets the goals of the agency which provides the program's funding,

with an important effect on retention of the funds (A.963-964). Similarly, the Field Instruction Committee monitors the school's field instruction program, through which students are placed with outside social agencies. This Committee shares responsibility with the dean and the Field Instruction Coordinator (a member of the faculty) to choose outside agencies, a responsibility which is delegated from the faculty (A.1037).

The hiring, promotions, termination, and tenure policies of the school were, at the time of the hearings, in a state of transition. Hiring was at that time conducted by an ad hoc faculty selection committee which interviewed candidates submitted to it by the dean (A.966). Except in one instance where there were only two candidates, one of whom was clearly superior, the dean always submitted several candidates to the committee and had accepted all recommendations made by the committee (R.3643-3644; A.1033).

The school's Personnel Committee has drawn up guidelines for revision of the hiring, tenure, termination and promotions policies (A.1592). The determinative role of the faculty in hiring was retained, and the faculty's role in promotion, tenure, and termination was substantially expanded.

A faculty meeting, held shortly before Dr. Green testified, enacted only part of the guidelines; the remainder of the proposal was submitted to a committee for further study (A.1003).

Except for a minor clause which was contrary to the University's Faculty Handbook, Green confirmed that the Wurzweiler faculty had the authority to promulgate such guidelines, binding upon the dean (A.1004-1005).

B. The Explicit Language of the Act and Applicable Judicial Decisions Mandate the Exclusion of All Faculty.

The evidence shows that faculty play a significant, albeit not an exclusive role, in the management of the University. For the most part they have complete control over the the University's curriculum, i.e., the "product" of an educational institution. They play a pivotal role in determining the size of the respective schools' student bodies, i.e., the number of "customers" who will be serviced by the University enterprise. Their important role in setting tuition rates, i.e., the "price" to be charged to offset in part the cost of the educational product, is plainly demonstrated in this record. Beyond this there is uncontroverted proof that faculty control hiring, tenure, promotions, and a host of other vital decisions. Given this record, therefore, faculty must be excluded as supervisory and managerial personnel. To do otherwise would effectively excise those exclusions from the Act.

In maintaining that Yeshiva faculty are not managerial or supervisory employees, the Board seeks shelter in the doctrine that deference is owed to its determinations in representation

matters (NLRB Br. 15). The Board's rulings in this case, however, need only be upheld if they are "supported by substantial evidence on the record considered as a whole" and have a "reasonable basis in law." GAF Corp. v. NLRB, 524 F.2d 492, 495 (5th Cir. 1975).

The Board's discretion, moreover, is particularly narrow in determining whether an employee is a supervisor for "[t]he Act describes supervisors in detail, and the Board can only find as a matter of fact that the individual falls within or without the statutory definition." NLRB v. Esquire, Inc., 222 F.2d 253, 257 (7th Cir. 1955). As the cases show, the Courts of Appeals have not hesitated to vacate the Board's findings that particular employees lack supervisory and managerial status. See, e.g., NLRB v. Metropolitan Life Insurance Co., 405 F.2d 1169 (2d Cir. 1968).*

Two categories of employees are excluded from coverage of the Act: supervisors (by the explicit language of the Act), and managerial employees (by Board and judicial interpretation). The faculty of Yeshiva University falls within both categories.

Supervisory status is defined in §2(11):

* See, also, NLRB v. Pilot Freight Carriers, Inc., 558 F.2d 205 (4th Cir. 1977); NLRB v. Detroit Edison Co., 537 F.2d 239 (6th Cir. 1976); NLRB v. Metropolitan Petroleum Co., 506 F.2d 616 (1st Cir. 1974); NLRB v. Gray Line Tours, Inc., 461 F.2d 763 (9th Cir. 1972); Turner's Express, Inc. v. NLRB, 456 F.2d 289 (4th Cir. 1972); and Arizona Public Service Co. v. NLRB, 453 F.2d 228 (9th Cir. 1971).

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

As the Board itself recognizes, it is well-settled that the supervisory definition of §2(11) must be read in the disjunctive, so that an employee is a supervisor if he possesses authority to exercise any one of the powers set forth in that section. NLRB v. Metropolitan Life Insurance Co., supra; NLRB v. Detroit Edison Co., supra; Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899; NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948), cert. denied, 335 U.S. 908; see, NLRB Br. 25. It is, moreover, the mere existence of supervisory authority, not the exercise of it, which gives rise to supervisory status. Arizona Public Service Co. v. NLRB, supra; NLRB v. Gray Line Tours, Inc., supra.

In its Textron decision,* the Supreme Court has confirmed that, in addition to supervisors, all managerial employees must be excluded from coverage of the Act. Yeshiva's faculty are managerial employees if they meet either of two tests: (1) even

* NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267 (1974).

if they are not supervisors, if they are in a position of authority which presents a potential conflict of interest between the University and other of the University's employees; or (2) if they formulate the University's policies, either in the labor field or in any other area. See, Retail Clerks International Association v. NLRB, 366 F.2d 642 (D.C. Cir. 1966), cert. denied, 386 U.S. 1017 (1967).

Yeshiva faculty certainly exercise supervisory authority within the meaning of Section 2(11). And managerial status would seem unquestionably mandated for them both in light of the conflict of interest inherent in their authority to make personnel decisions, and as a consequence of the power of faculty to determine many of the University's labor and other policies.

The Board argues that the fact that actions of the faculty in personnel and other areas are almost always given effect is merely a sign of the "respect" paid to the "professional" opinions of the faculty (NLRB Br. 23). This argument is plainly at odds with the record, which shows that the faculty constitute an integral part of the governance structure of the University, operating under formal governance documents and having the authority to "overrule" and "bind" deans even on critically important personnel and management decisions with which the deans disagree (see, e.g., A.282-283, 417-418, 547-549, 668-671, 733-736, 753-756, 792-797, 1004-1005, 1453-1454).

The Board apparently also argues in its brief that managerial and supervisory status for the University's faculty is precluded because they are professional employees within the meaning of Section 2(12) of the Act. For example, the Board neatly turns the statutory test on its head by contending that: "[T]he faculty's extensive role in determining academic policy further supports the Board's conclusion that they are professional, not managerial employees." (NLRB Br. 23)

The status of the University's faculty as professionals is, of course, undisputed. What the Board fails to recognize is that professional employees on the one hand, and managerial and supervisory employees on the other, are not mutually exclusive categories. Rather, once it is determined that an employee is a professional, a further question arises: is he a manager or supervisor. Thus, in each of the cases cited by the Board for descriptions of work "typically" performed by professionals, one or more categories of the professionals in question were in fact excluded as supervisors or managers. See, Westinghouse Electric Corporation, 163 NLRB 723, 726 (1967), enf'd 424 F.2d 1151 (7th Cir. 1970), cert. denied, 400 U.S. 831 (lead engineers); Puget Sound Power & Light Company, 117 NLRB 1825, 1827 (1957) (senior distribution engineers); and General Dynamics Corp., Convair Aerospace Division, 213 NLRB 851, 860, 862 and 863 (1974) (administrative accountants, price estimators and senior quality assurance specialists).

Indeed, much less authority than has been shown here routinely serves to exclude persons in the industrial sector as managers and supervisors. For example, in General Telephone Company of Michigan, 112 NLRB 46, 48-50 (1955), service assistants, who had "no authority to hire, discharge, assign, promote or discipline employees," were held to be supervisors because their evaluations of operators were given "substantial weight" by chief operators. This was so even though the chief operators made "thorough investigation before disciplining operators or effecting changes in their status, and [were] in a position to form personal estimates of their qualifications." Similarly, in Pittsburgh Plate Glass Co., supra at 977, laboratory assistants were held to be supervisors merely because their hiring recommendations were given "great weight" by management. And, in Gray Line Tours, supra, the Ninth Circuit reversed the Board's ruling on supervisory status, holding that bus dispatchers were supervisors solely because of their authority (which apparently was not exercised) to send drivers home for various reasons.

The Board's decision is premised on three doctrines, two of which are apparently applied solely to university faculty. First, the Board states that so long as "ultimate authority" remains in the University's Trustees or President, effective recommendations by faculty do not give rise to supervisory and managerial status (A.5; see, NLRB Br. 22). Second, the Board has concluded that authority exercised by the faculty as a group --

"decision making on a collective rather than individual basis" -- is not supervisory or managerial authority within the meaning of the Act (A.5).

As a test of supervisory status, the "ultimate authority" doctrine is not only unprecedented, but is directly contrary to the explicit language of the Act.

Section 2(11) requires only that a supervisor possess authority "effectively to recommend" actions, not that he be empowered to put those actions into effect himself. As stated by this Court in NLRB v. Metropolitan Life Insurance Co., supra at 1177, "The power to recommend promotion is, of course, not the power actually to promote and consequently promotion recommendations will always be subject to review by those others who, in fact, have the final power to promote." In fact, in NLRB v. Gary Aircraft Corp., 368 F.2d 223, 224 (1966), cert. denied, 387 U.S. 918, the Fifth Circuit ruled leadmen to be supervisors even though the court explicitly stated that "ultimate authority" lay in more senior foremen. See, also, Wisconsin River Valley District Council v. NLRB, 532 F.2d 47, 49 (7th Cir. 1976) (project supervisor held to make effective hiring recommendations because those recommendations were "usually" followed by his employer); Transformer Engineers, 114 NLRB 1325, 1327 (1955) (leadladies, working under foremen, held to be supervisors because the foremen gave "great weight" to the leadladies' opinions about employee performance); and Eastern Greyhound Lines, Inc. v. NLRB, 337 F.2d 84,

89 (6th Cir. 1964) (dispatchers held to make effective disciplinary recommendations even though higher supervisory officials made independent investigations before final action).*

The overwhelming weight of the evidence in this case demonstrates that the "ultimate authority" of the University's Board and President, acting on its behalf, to make hiring, promo-

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- * The Board's citation to NLRB v. Wentworth Institute, 515 F.2d 550 (1st Cir. 1975) in support of its "ultimate authority" doctrine is entirely misplaced (NLRB Br. 21). In Wentworth the institution was unable to show, on the facts of the case, supervisory or managerial authority. Instead, it argued that all faculty at all institutions of higher learning were required to be excluded regardless of the precise authority possessed by them. In contrast to Yeshiva, however, the court found that at Wentworth "there is no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters other than the scheduling of exams, classes and other such routine matters." Wentworth Institute, supra at 557.

After stating that "[w]e do not take Wentworth's views lightly," the court held that

"[W]e are unable to convince ourselves that all faculties of all private nonprofit institutions of higher learning in the nation are so situated as to fall outside the ranks of "employees" under the Act. Given wide differences in terms of service and responsibility, the focus must be upon each particular institution.

* * *

"[W]e do not comment on the Board's developing views on the significance of a substantial faculty role in decisions on curricula, admissions, hiring, degree requirements, and other educational policy matters." (Wentworth Institute, supra at 556, 557, emphasis added)

In light of the record of this case, Wentworth plainly does not govern here.

tion, tenure, and termination decisions is rarely exercised. On the contrary, the testimony documents that the actual decision in each of these areas is effectively made within the individual schools of the University, with the role of the central administration being for the most part routinely to ratify those decisions.

The ultimate authority doctrine is equally untenable as used to determine managerial status of university faculty. If the doctrine were followed in the non-academic world it would result in coverage by the Act of the entire management hierarchy up to the president and board of directors of a corporation. And, if it were consistently applied to universities, the doctrine would lead to the inclusion of deans and other administrators whose authority is, after all, subordinate to that of the president and the trustees.

Textron*, however, explicitly holds that all managerial employees are excluded from coverage of the Act. In terms pertinent here, the Court in Textron quoted with approval Justice Douglas' dissent criticizing the majority holding in the Packard case** that foremen could constitute an appropriate collective bargaining unit:

* NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267 (1974).

** Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

"The present decision. . . tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industry hierarchy. It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other.

* * *

For if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents -- indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors." (Packard at 494)

Thus, it is not ultimate authority, but managerial or supervisory status which is the test of exclusion from the bargaining unit. That the administrative accountants in General Dynamics, supra at 860, were required to defer to "higher authority" for final decisions on capital expenditures clearly did not prevent their exclusion as managerial employees. Similarly, in Sutter Community Hospitals, 227 NLRB No. 18 (1977), the Board held that a clinical specialist was a manager despite its express finding that "the role of this specialist is subordinate to those of the associate director and director of nursing" (slip op. at 39).

The second doctrine applied by the Board to deny supervisory and managerial status to the University's faculty was first announced in C.W. Post Center of Long Island University, 189 NLRB 904, 905 (1971):

"Mindful that we are to some extent entering into an unchartered area, we are of the view that the policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within the meaning of Section 2(11) of the act, or managerial employees who must be separately represented."

The Board cited absolutely no authority for the novel proposition that authority exercised by a group does not give rise to supervisory and managerial status. In fact, the management of almost any business enterprise is carried out by groups, whether by a board of directors, or a management committee constituted to devise policy in some area. See, "Consensus Management at Graphic Controls", Organizational Dynamics, Winter 1977, p. 23; "Team Management and How It Works", Federal Home Loan Bank Board Journal, January 1977, p. 2; and "Team Management: Are Two (or more) Heads Better Than One?", Savings & Loan News, January 1977, p. 48.

The Board itself has excluded supervisors because of participation in group decision making. Thus, in Western Saw Manufacturers, Inc., 155 NLRB 1323, 1329 (1965), a foreman was found to be a supervisor in part because he served on a board which determined whether employees should be terminated. In fact, in Florida Southern College, 196 NLRB 888, 889 (1972), the dean of students was excluded as a supervisor solely because he sat on a committee which made effective recommendations re-

garding the hiring and firing of faculty members.*

The Board's final argument as to why the University's faculty are not managers and supervisors is that the faculty act in their own interest, not on behalf of the institution as a whole (NLRB Br. 20). The Board is able to point to no portion of the record to support this proposition. Rather, the Board's argument seems to be premised on its underlying conception of the University as a place, like a factory, where the interests of faculty and the institution are fundamentally opposed.

The Union itself concedes that the University and its faculty share an "identity of interest[s]" in furthering the educational ends of the school (YUFA Br. 41). In fact, almost all administrators at Yeshiva began their careers as faculty; most retain their faculty rank; and many continue to teach. In schools where deans view themselves as the "executive arm of the faculty", and see their role as "simply [to] carry out the mandate of the faculty", it is impossible to find in the record the kind of sharp dichotomy between management and labor found in the industrial sector.

* Nor has the fact that authority is exercised by a group prevented the Board from recognizing the existence of that authority in other contexts. See, e.g., the cases excluding employee-shareholders from bargaining units where those shareholders in the aggregate held sufficient shares to give them an effective voice in the formulation of corporate policy. Sida of Hawaii, 191 NLRB 194, 195 (1971); Brookings Plywood Corp., 98 NLRB 794, 798 (1952); and Red and White Airway Cab Co., 123 NLRB 83, 85, (1959).

The Circuit Courts of Appeals have, in fact, dealt with an analogue of the situation found at Yeshiva -- the sharing of interests between the employer and employees -- and have rejected the argument that supervisory authority must be exercised exclusively in the interest of the employer.

Thus, Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697 (5th Cir. 1964) involved multiple truck owner-drivers who leased their trucks to their employer, Deaton. The union argued that "the supervisory authority of the multiple owner-drivers over other drivers of their trucks [was] exercised in the interest of the multiple driver and not in the interest of the employer." (Id. at 699). The court, however, rejected the union's argument, expressly holding that the multiple owners were supervisors despite the finding that they exercised their authority in their own interest as well as the employer's:

"Granted that the supervisory authority is to be exercised in the interest of the multiple owner, such interest is so intertwined with the interest of Deaton in the successful and efficient operation of the trucks that it cannot be denied in most instances of actual execution the supervisory authority is in the interest of both Deaton and of the multiple owner." (337 F.2d at 699)

Similarly, in NLRB v. Scott Paper Company, 440 F.2d 625, 630 (1971), the First Circuit followed Deaton Truck Line, supra, rejecting the Board's contention that the supervisory authority at issue was not "in the interest of the employer."

The disputed supervisors were once again owner-drivers who leased their equipment to the employer:

"Both the Company and the tractor owner-operator have the same interest, backed by their separate investments to be sure, in maximizing production. We are unable to distinguish Deaton Truck Lines ... in which the interests of both the company and the truck owners were so intertwined that the powers were exercised for both." (440 F.2d at 630)

Plainly, "in the interest of the employer" does not, under the statute, mean solely in the interest of the employer.

In these circumstances, and particularly because of the unquestioned managerial control that has been proven here, we submit that the Court should hold all members of the University's faculty to be supervisory and/or managerial employees. In doing so the Court should, to the extent necessary, reverse the Board's ill-conceived "ultimate authority" and "collective responsibility" doctrines, neither of which is supported by the Act.

POINT II

ALL DEPARTMENT CHAIRMEN AND THEIR CONCOMITANTS ARE MANAGERIAL AND/OR SUPERVISORY EMPLOYEES.

A. The Supervisory and Managerial Powers of Department Chairmen.

In Point I, we dealt with the managerial and supervisory functions of the faculty under the varying systems of shared management that exist at each school of the University. Here, we turn to the special role assumed by departmental chairmen -- to the authority that they exercise by virtue of their position as chairmen rather than by virtue of their role as faculty members at large.

The Board has ignored all the evidence to this effect, most of which was uncontroverted, and, in the process, has countenanced absurdly high supervisory ratios. The Board fails to point to precedent for supervisory ratios even remotely approaching Yeshiva College's 118 to 1 or Stern College's 80 to 1. Indeed, the Board itself has noted that it is "incredible to believe" that one supervisor could supervise 35 employees, Weather Seal Inc., 161 NLRB 1226, 1231 (1966). See, also, Russell S. Kribs Associates, Inc., 181 NLRB 1109, 1111 (1970).

The record plainly shows that the supervisory and managerial recommendations of chairmen are made as their personal

recommendations in their capacity as first level administrators. Some such powers are exercised by chairmen in most schools. For example, under the Faculty Handbook, sabbatical leaves may not be granted without the approval of the department chairman (A.1506). Similarly, particularly in larger schools, the department chairman is the person normally looked to by a faculty member for the adjustment of complaints and grievances (A.142-143).*

However, despite these and other common powers, there is enough variation from school to school in the specific authority exercised by chairmen, that an accurate picture can only be obtained on a school-by-school basis.** We submit that what that picture shows is something quite different than the state of affairs that was before the First Circuit in Boston University v. NLRB, (Nos. 77-1143, 1226 and 1365, April 13, 1978), where that school's chairmen were treated as employees and, with judicial

* These grievances are day-to-day problems, rather than the promotion and related matters that come to the Faculty Review Committee for resolution (see, pp. 66-68, infra).

** The following table shows that department chairmen are concentrated in the University's larger schools, Yeshiva College and Stern College for Women (A.1544, 1564, 1575, 1577; Univ. Exs. 129, 139 and 144):

<u>School</u>	<u>Number of Chairmen</u>
Yeshiva College	15
Stern College for Women	9
James Striar School	2
Ferkauf Graduate School	5
Belfer Graduate School	4
Erna Michael College	3
Bernard Revel School	7

approval, were included in the unit. At Yeshiva most personnel recommendations of chairmen are made as "the recommendation of the chairman as the chairman of the department," not as the product of a faculty vote or consensus (A.312, 315-337, 512, 514, 824, 831). This was not so at Boston University where that school's Faculty Manual permitted a chairman to make hiring recommendations "only after consultation by him with all full professors with tenure of that department," and re-appointment, promotion and disciplinary recommendations were made only after the chairmen "consult[ed] with and usually obtain[ed] the consensus of the tenured faculty members."

Further, at Yeshiva a majority of chairmen are either appointed by the dean without consultation with faculty (Stern College) or are the most senior members of their departments (Yeshiva College and the James Striar School). At Boston University selection of chairmen was "usually based on a consensus of the faculty", something that is a minority phenomenon at Yeshiva University.

Finally, there is no showing that the First Circuit in articulating its decision dealt with enormous supervisory ratios of the type that the Board countenanced here. And even if such ratios were involved and were approved sub silentio, we respectfully suggest that in so doing the First Circuit's decision was erroneous and should be disregarded here where the facts are, in any event, substantially different.

1. Stern College for Women (Supervisory Ratio: 80 to 1)

The uncontroverted evidence is that Stern's nine department chairmen make effective recommendations regarding hiring, termination, promotion and tenure for the school's faculty. In doing so, a chairman acts as "the decision-making person within the department," not as the representative of the department's faculty (A.315).

The need to hire a new full or part-time faculty member is generally called to the dean's attention by the department chairman. Interviewing is done by the dean and the chairman and they agree on an appointment (A.313). Dean Mirsky has never made an appointment that is not recommended by the chairman. Id. Approval of their hiring recommendations by the President is "routine" (A.318). Mirsky speaks to the chairman regarding hiring as the administrator -- "the decision-making person" -- within the department, not as the representative of the department's faculty (A.315).

Chairmen make similarly effective recommendations regarding termination of part-time and probationary full-time faculty. Thus, the chairmen are entirely responsible for faculty evaluation and have complete freedom in deciding how to make evaluations. Some chairmen visit classrooms, for which no permission of the faculty member is required (A.324-326). Based on that evaluation, the chairman makes a recommendation for termination or for retention. Mirsky has only once disagreed with a chairman regarding termination. (A.316-322, 387-389).

The tenure process also begins with a recommendation from the chairman. Mirsky has never consulted on tenure with a faculty member other than the chairman (A.361). All negative tenure recommendations by chairmen have been accepted by Mirsky and the administration. The only positive recommendation Mirsky ever disagreed with occurred when a chairman recommended himself for tenure, and in that case the chairman was, in fact, granted tenure (A.327-328, 361-362). The chairman's responsibility is to make a tenure recommendation "in his capacity as chairman," not as a representative of his department (A.326-327, 360-361).

Authority in granting promotions is shared between the chairmen and the Promotions Committee -- three members of which are themselves chairmen (A.362-363). The committee solicits the promotion recommendation from the chairman (A.328). The committee has never recommended a promotion over a negative chairman's recommendation, and in six years as dean, Mirsky has accepted all the committee's promotions decisions. The President has granted the great majority of recommended promotions and has never overruled a negative recommendation (A.286-287, 330).

Chairmen at Stern are appointed by Mirsky, who does not consult with members of the departments in making the appointments (A.311-312). To compensate chairmen for "administrative services rendered to the college," chairmen receive a remission of one-quarter the normal teaching load (A.312).

There are thirty-eight full-time and forty-two part-time faculty members at Stern (A.1544). Mirsky has one assistant (who is a clerical employee charged with supervision of other clericals), and four other administrative personnel (who function only with regard to the school's 550 students) (A.330-332). If chairmen are not supervisors, therefore, Stern operates under a supervisory ratio of 80 to 1, with the only supervisor being the dean.

2. Yeshiva College (Supervisory Ratio: 118 to 1)

Yeshiva College is divided into "subject areas", which are the de facto equivalents of departments in other schools. Subject areas are, in turn, organized in four broad "divisions". The faculty member with the most seniority in a subject area is the "senior professor"; in the everyday language of the school he is referred to as the department chairman (A.449). One senior professor in each of the four divisions, in addition to being the senior professor of a subject area, serves as the "division chairman". The four division chairmen meet as the Advisory Council; senior professors meet as the Committee of Senior Professors. Dean Bacon's testimony on the supervisory and managerial authority of the senior professors and division chairmen was not controverted.

Promotions at the school are determined by division chairmen, acting individually and as members of the Advisory Council. The process begins with a recommendation from the

chairman. Indeed, a faculty member who asks Bacon to be considered for promotion will be referred to his division chairman (A.442). A positive chairman's recommendation gives the reasons "he feels" a promotion is warranted. In a negative recommendation, the chairman will merely present the faculty member's request for promotion without comment (A.442-444). Positive recommendations are generally accepted by the council, as are all negative recommendations (A.444).

The President has always followed decisions of the chairman's council whether positive or negative, and has granted a promotion opposed by Bacon but favored by the council, and has denied promotions where favored by Bacon but opposed by the council (A.445-446). In making promotion decisions, division chairmen do not represent the consensus, vote, or opinion of other faculty members of a department (A.512-513).

Sabbaticals are handled in a similar fashion. The division chairman makes a recommendation to the Advisory Council for or against granting a sabbatical. The chairman's recommendations are generally accepted by the division chairmen's council and the council's decisions have never been overruled by the President (A.447-448).

Dean Bacon's testimony documented that effective recommendations are made by senior professors in the hiring of full and part-time faculty (A.450). Either the dean or the

senior professor first determines that an additional faculty member is necessary. Initial screening of applications and interviewing is carried out by the senior professor. The senior professor^v chooses which applicants will be given a further interview, which is carried out either by the dean or the dean and senior professor. The dean and senior professor then jointly make a hiring decision, with Bacon generally accepting the recommendation of the senior professor (A.450-453). Dean Bacon has never appointed a full or part-time member of the faculty over the objection of a senior professor and once sustained such an objection when Vice-president for Academic Affairs Fishman wished an appointment made (A.451-454).

During his sixteen years as dean, Bacon has in almost every case accepted both positive and negative recommendations of senior professors regarding the termination and reappointment of probationary full-time and part-time faculty (A.456). Neither Bacon nor the senior professor have ever consulted with other faculty members regarding termination or reappointment, and the decision is made solely on the basis of the personal judgment of the senior professor, with occasional input from the division chairman (A.513-514).

Senior professors largely determine the budget of their "subject area". Each senior professor makes budgetary requests, which "99 percent" of the time receive the "perfunctory" approval by Dean Bacon. The requests are never rejected by the University administration (A.522-523).

Yeshiva College has thirty-six full-time and eighty-two part-time faculty (A.1564). If the Board determines that the school's fifteen senior professors and division chairmen are not supervisory employees, then Yeshiva College operates under a supervisory ratio of 118 to 1.

3. Erna Michael College (Supervisory Ratio: 38 to 1)

Like Yeshiva College, Erna Michael's departments are called "subject areas". It has only three department chairmen, who are called "senior professors" (A.537, 539).

Dean Rabinowitz, whose testimony was uncontroverted, views the role of senior professors as a "determining factor" in full-time hiring. Rabinowitz depends on them to carry out initial investigations and interviewing of applicants (A.599-600). The senior professor then makes a hiring recommendation, and Rabinowitz has never hired a full-time member of the faculty without the consent of the senior professor involved (A.599-601). In fact, a professor has been hired over an applicant favored by Rabinowitz because of the recommendation of the senior professor (A.600-600a).

There is no difference between the full-time and part-time hiring process, and the salary of a new part-timer is set by Rabinowitz based on the kind of recommendation given by the senior professor (A.567, 610-611).

When it has been necessary to terminate a faculty member for budgetary reasons, the decision of whom to terminate, and the

program to cushion the termination (by retaining a faculty member for one year as a part-timer), were worked out jointly by Rabinowitz and the senior professor involved (A.601-603).

Evaluation of faculty for purposes of retention and salary is also the responsibility of senior professors. Senior professors sometimes go directly to Rabinowitz with their evaluation. Other times, evaluation is carried out at the subject area meeting under the "lead" of the senior professor (A.604-605). Rabinowitz does not ask senior professors to consult with other members of the department regarding evaluations, and simply leaves it to the chairmen whether to obtain the views of other faculty (A.641-642).

Erna Michael has twenty-one full-time and seventeen part-time faculty, and there are no assistant or associate deans (A.608, 1575). Thus, the supervisory ratio at Erna Michael, exclusive of senior professors, would be 38 to 1.

4. James Striar School of General Jewish Studies (Supervisory Ratio: 15 to 1)

Because of its small size James Striar has only two chairmen, who were chosen on the basis of seniority (A.712).

Rabbi Besdin's uncontroverted testimony shows that the chairmen play a significant role in the hiring of full and part-time faculty, and Besdin has never hired a full-time faculty member without consulting the affected chairman (A.690-691).

Part-time hiring decisions are made between Besdin and the chairman (A.694-695).

There are six full-time and nine part-time faculty at Striar and there are no assistant or associate deans (A.695-696, 1577). Absent the two chairmen, therefore, Striar has a supervisory ratio of 15 to 1.

5. Belfer Graduate School of Science
(Supervisory Ratio: 41 to 1)

Dean Komar's uncontroverted testimony is that Belfer's chairmen make effective recommendations regarding the salaries of both full and part-time faculty, and that they play, in general, an important managerial role in the school.*

Komar never conducts salary negotiations with new full-time faculty. These negotiations are conducted by the department chairman and Komar generally accepts the chairman's salary recommendations for a specific salary figure (A.813-815). Similarly, all part-time salaries are negotiated by the chairman (A.901-902). Neither Komar nor the administration have ever changed the recommendations of a chairman regarding part-time salaries (A. 906).

Komar's testimony shows that the chairmen -- making their own personal recommendation and not reflecting a vote

* Belfer has only four chairmen, three of whom are principal investigators (A.1582; Univ. Ex. 129).

or a consensus within their department -- also make effective recommendations regarding salary increases for full-time faculty. Thus, during the two years immediately prior to the hearings, because of University-wide budgetary restrictions the actual increases recommended by the chairmen could not be given. However, both the priority sequence and the order of magnitude of salary increases were accepted by the administration (A. 830-836).*

Other substantial managerial functions performed by chairmen have included the initiation by the chairman of the

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- * The Board contends that the Belfer chairmen's salary recommendations regarding full-time faculty were not effective within the meaning of the Act because "on occasion" faculty went directly to the President for "adjustments" in the increases recommended by the chairmen (A.836; NLRB Br. 37, fn. 14). The Board's contention (which, in any event, is wholly inapplicable to the chairmen's authority to make effective recommendations respecting part-time salaries or salaries for new full-time faculty) is plainly at odds with the statutory test, which does not require that a supervisor's recommendations be invariably followed.

Thus, in Eastern Greyhound Lines v. NLRB, 337 F.2d 84, 89 (1964), the Sixth Circuit reversed the Board's finding that disciplinary recommendations were not effective, stating that: "Even the occasions when the particular style and extent of the discipline recommended were not carried out do not support a conclusion that the recommendation was not effective. If some discipline was meted out, the recommendation that discipline be imposed was effective. We do not believe that the circumstance that dispatcher recommendations are subject to independent investigation before final action detracts from this fact." See, also, Wisconsin River Valley District Council, supra at 49 (hiring and firing recommendations "usually" followed by employer); General Telephone Company of Michigan, supra at 50 ("[O]pinions of service assistants given substantial weight by chief operators in determining whether changes in status should be made ... despite the fact that they may be subject to an independent investigation.").

Chemistry Department, Dr. Pomerantz, of a University-wide Chemistry Department. Pomerantz also handled the negotiations with the New York State Education Department to try to prevent the de-registering of the department (A.47, 801-803). Similarly, the chairman of the Math and Science Education Department effectively recommended the cancellation of a tuition increase for her department (A.827-830).

Chairmen are viewed by Dean Komar as taking part in the "management" of the school, and a reduction in work load is available to all chairmen (A.824, 887).

There are thirty-eight full-time and three part-time faculty at Belfer (see, Univ. Ex. 129). Absent the chairmen, Belfer operates under a supervisory ratio of 41 to 1.

6. Bernard Revel School (Supervisory Ratio: 20 to 1)

The uncontroverted testimony of Secretary of the Faculty Landman shows that Revel department chairmen make effective recommendations in full and part-time faculty hiring. Thus, the chairman recommends both full and part-time candidates for positions in his department, and those recommendations are generally given effect. Negative recommendations, in fact, have never been reversed (A.1107). Three chairmen receive workload reductions to compensate them for their responsibilities as chairmen (A.1110).

Revel has 20 full and part-time faculty (see, Univ. Ex. 139), leaving, if the chairmen are not supervisors, a supervisory ratio of 20 to 1.

7. Ferkauf Graduate School (Supervisory Ratio: 58 to 1)

Part of the responsibility of four of the school's five chairmen is to act as principal investigators of departmental training and facilitating grants. These chairmen, who have presumably already been excluded by the Board as a consequence of their supervisory and managerial powers, have authority to hire, responsibly direct, discipline, and terminate all employees under their grants, as well as draw up grant proposals and generally administer their grants. Two members of the Special Education Department, for example, are employed under Chairman Miller's departmental grant (A.1207-1217, 1603-1606; R.3978, 3992-3993, 3995).

Even beyond the chairman's role as principal investigator, he is viewed by Dean Gittler as "the administrator in his department," and is entitled to a reduction of one-half of the normal faculty workload (A.1175, 1178). Sabbaticals, for example, are granted only after a positive recommendation from the department chairman (A.1195).

The normal workload for full-time faculty was established by the chairmen in consultation with their departments.

In the absence of agreement regarding a specific faculty member's workload in any given semester, the chairman's decision governs (A.1159-1160).

Department chairmen recommend the hiring of part-time faculty, probably after consultation with members of the department. Gittler generally accepts those recommendations (A.1199-1200). The amount of money available for each department for part-time hiring is decided after discussions in the Chairmen's Council (A.1200).

Chairmen have authority to direct and reprimand departmental secretaries, to determine who the secretary will work for if there is a dispute and effectively to recommend the secretary's termination for cause (A.1195-1197).

Chairmen at Ferkauf exercise substantial authority in interdepartmental matters through the Chairmen's Council. In Dean Gittler's words, through this council the "chairmen run the school" (A.1250). Thus, until budget restrictions of the last two years, "every aspect of the budget" was deliberated by the council, and chairmen would continue to have this budgetary responsibility if discretionary funds again became available. In fact, when additional faculty appointments became possible the allocation of appointments between departments was decided by the chairmen (A.1179-1180). Similarly, tuition increases are never recommended by Gittler unless the chairmen agree, and

recommendations for tuition increases are often initiated by the chairmen (A. 1183).

There are no assistant or associate deans at Ferkauf (A.1198). If the department chairmen are not supervisors, the school's thirty-two full-time and twenty-six part-time faculty are supervised only by Dean Gittler, and the school operates under a supervisory ratio of 58 to 1 (See, Univ. Ex. 144).

B. The Act Compels the Exclusion of All Chairmen as Managerial and/or Supervisory Employees.

The record evidence (most of it uncontroverted) establishes that all department chairmen at Yeshiva, in addition to acting as first-level administrators, possess one or more of the Act's criteria of supervisory status and, thus, are supervisors within the meaning of the Act:

1. Hiring (Stern College, Yeshiva College, Erna Michael College, James Striar, Belfer, Revel and Ferkauf).
2. Termination (Stern College for Women, Yeshiva College and Erna Michael College).
3. Promotions (Stern College for Women and Yeshiva College).
4. Sabbaticals (Under the Faculty Handbook, no sabbatical may be granted without the approval of the department chairman).

5. Faculty evaluation (Stern College for Women and Erna Michael College).

6. Salary for new faculty appointments and faculty merit increases (Belfer).

7. Faculty workload (Ferkauf).

8. Budgetary decisions (Yeshiva College and Ferkauf).

Recommendations made by chairmen in the areas noted above are for the most part routinely approved by the central administration. However, even if that administration did regularly and independently consider the merits of personnel recommendations by chairmen, chairmen would nonetheless be supervisors in light of the demonstrated effectiveness of their recommendations.

In NLRB v. Southern Airways Co., 290 F.2d 519, 524 (5th Cir. 1961), for example, the fact that higher authorities often carried out independent investigations of discharge and transfer recommendations made by dock chiefs did not prevent a finding of supervisory status because "the recommendations were at least effective a good portion of the time." See, also, Eastern Greyhound Lines, supra at 89 (dispatchers held supervisors even though higher officials made independent investigations before final action); Pittsburgh Plate Glass, supra at 977 (laboratory assistants were supervisors even though higher management officials carried out "independent investigation and review" of hiring recommendations).

It would, finally, defy common sense to think that the wide array of personnel decisions made by chairmen could invariably be made without some consultations by the chairmen with other members of the faculty to obtain their views of the persons about whom the decisions are to be made. Certainly such consultations, to the extent they may exist, no more render the chairmen non-supervisory than they would render higher levels of administrators non-supervisory. The record shows that at, for example, Stern College, Yeshiva College and Erna Michael, the deans and President go far beyond "consulting" with the department chairmen in making hiring decisions and, in fact, those decisions are effectively made by the chairmen. Yet, the Board uses the instances of consultations by the chairmen -- most of which occur in the smaller schools containing a minority of the chairmen -- to argue that the chairmen act not in the interest of the institution as a whole, but rather in the narrow interest of their department's faculty.

What is missing from the Board's argument is not only consistency -- it is hard to understand why it is determinative of supervisory status that some chairmen take into account the views of other faculty in making personnel decisions, but not, for example, that the dean of Stern College has never hired a new faculty member not recommended by the chairman (A.313). What is also missing is the evidentiary and legal connective between these "consultations" and the Board's conclusion that chairmen do not act "in the interest of the employer."

Plainly, under Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697 (5th Cir. 1964) and NLRB v. Scott Paper Company, 440 F.2d 625 (1st Cir. 1971), it is not sufficient for the Board to argue that the chairmen's unquestioned supervisory powers are exercised in part on behalf of the members of the chairman's department and in part on behalf of the institution as a whole. So long as the interests of the faculty and the institution are "so intertwined that the powers [are] exercised for both," the chairmen must be excluded. Scott Paper Company, supra at 630.

The record, in fact, fails to contain substantial evidence to support the Board's contention that chairmen do not act in the interest of the institution as a whole. Thus, although the Union's principal witness on the authority of chairmen (one of its officers, Professor Martin Miller) was a department chairman at the Ferkauf Graduate School, and was presumably in a position to give detailed, first-hand testimony regarding the authority of chairmen, he failed entirely to do so. Instead, his testimony consisted of one or two sentence conclusory responses that chairmen at Ferkauf (no where else) were "conduits" between the dean and faculty, that the chairmen's role in hiring was "advisory", in promotion "similarly advisory" and in tenure that it was "analogous to the problem of promotion" (see, A.250-253).

An analysis of the evidence, moreover, shows that it simply fails to support the Board's assertions:

The Board, for example, contends that Stern chairmen "act on behalf of the faculty" (NLRB Br. 31). Absolutely no grounds for this contention are found in the Board's citation to the record. On the contrary, the uncontroverted testimony plainly shows that chairmen at Stern are appointed by the dean, receive a reduction in teaching load and act as administrators within their departments (see, e.g., A.311-312, 315, 326-327, 360-361).

Similarly, the Board in its brief states that Belfer's dean has "refused" to refer departmental hiring recommendations to the President (NLRB Br. 33). Dean Komar, however, in the cited portion of the record, unequivocally stated that it has "never happened" that the dean has rejected a hiring recommendation. Rather, the passage of the transcript relied on by the Board shows that the appointment of visiting professors can be made by a principal investigator or departmental chairman (as the principal investigator of a departmental grant) entirely without the approval of the President (see, A.890-893).

At Stern and Yeshiva College, according to the Board, the department chairman "transmits the respective faculty's need for additional teaching personnel to the Dean" (NLRB Br. 34), leaving the clear implication that it is the faculty who determine that need. The uncontroverted testimony of those schools' deans shows, however, that it is the chairman and dean who begin the hiring process by determining that additional faculty are needed (A.313, 450).

The Board states that Stern College chairmen "often" consult their departments' faculty in making promotions recommendations (NLRB Br. 36), that a chairman at Yeshiva College and Erna Michael College "represents" the other faculty of his department (NLRB Br. 31), and that a Belfer chairman "communicates to the Dean" his department's promotions recommendations (NLRB Br. 36-37). The cited testimony shows that these statements are not supported by the record.

And, the Board's brief flatly states that chairmen do not adjust faculty grievances or set salary levels (NLRB Br. 37), despite the uncontroverted testimony of Vice President for Academic Affairs Fishman and Dean Komar, for example, directly to the contrary (A.141-142, 813-815, 830-836, 906).

In contrast, the deans' unequivocal testimony was that they rely on chairmen to act as the administrators of their departments and, in sum, to take part in the "management" of their schools (A.312, 315, 326-327, 824).

Indeed, Dean Mirsky of Stern testified that, in making tenure recommendations, "the responsibility and my expectation is that I will get the recommendation of the chairman as the chairman of the department" (A.326-327).

At Yeshiva College, the promotions recommendations of senior professors do not reflect a faculty vote or consensus,

and in making termination decisions neither Dean Bacon nor the senior professor have ever consulted a faculty member other than the division chairman (A.512-514).

And Dean Komar testified that salary recommendations by chairmen at Belfer were "their own recommendation", not the product of a faculty vote or consensus (A.831).

Thus, at Yeshiva University, unlike Boston University, chairmen act as first level administrators and not as mere "instruments of the faculty" (NLRB Br. 30). To deny the supervisory and managerial status of the chairmen would be to leave the University's thirteen widely separated schools under the supervision of the deans and a few members of the central administration, with, as a consequence, supervisory ratios of as high as 118 to 1. This result, which is at odds with common sense, plainly cannot be supported by either this record or the Act.

POINT III

ALL MEMBERS OF THE UNIVERSITY FACULTY REVIEW COMMITTEE AND OTHER FACULTY WITH SPECIAL ADMINISTRATIVE ROLES ARE MANAGERIAL AND/OR SUPERVISORY EMPLOYEES.

Like chairmen, certain faculty exercise special supervisory and managerial authority mandating their exclusion from any bargaining unit. These faculty -- members of the University Faculty Review Committee and of the Committee on Academic Priorities and Resource Allocation, the Assistant Dean of the Belfer Graduate School, and the Chairmen of the Doctoral and Admissions Committees at Wurzweiler -- exercise substantial supervisory powers and play a central role in the management of their respective schools.

A. The University Faculty Review Committee.

An important organ of University-wide faculty governance is the University Faculty Review Committee. The eight members of this committee, all of whom are full-time members of the faculty, are elected from the various schools of the University. They are empowered by the University to deal with any type of faculty grievance -- for example, failure to be granted promotion or tenure -- except those with economic effect (A.176-177, 1522). If a grievance cannot be satisfactorily resolved at a lower level, the final step of the grievance procedure is a recommendation by the committee directly to the President (A.1504, 1523-1524).

The Board contends that members of this committee are not supervisory or managerial personnel because they have not yet "exercise[d]" their authority under Section 2(11) and "no individual committee member" can adjust faculty grievances (NLRB Br. 29). These contentions plainly mistake the law.

It has been uniformly ruled by the courts that it is the possession of supervisory authority, and not the actual exercise of that authority, that is determinative. Thus, the Ninth Circuit in Arizona Public Service Company v. NLRB, supra at 230, stated that: "[A]n employee who has the power to fire and hire other employees is nonetheless a supervisor though he has never exercised that power." See, also, Gray Line Tours, supra at 764 ("[E]xistence of supervisory authority rather than its exercise is determinative."); Ohio Power Company v. NLRB, supra at 388 ("Section 2(11) covers any individual 'having authority ***responsibly to direct***.' It does not require the exercise of the power described for all or any part of the employee's time. It is the existence of the power which determines the classification.")

The Faculty Handbook clearly provides members of this committee with the authority to make effective recommendations respecting hiring, tenure and other faculty grievances. Indeed, the Union recognizes that the committee has "jurisdiction to review faculty grievances, particularly those concerning promotion and tenure, and [that] upon consultation with dean of the inter-

ested school, it is authorized to recommend action to the President." (YUFA Br. 21)

That decisions of the Review Committee may only be made as a group, moreover, plainly does not negate the existence of its authority. The Board's own decision in Florida Southern College, 196 NLRB 888, 889 (1972), is directly in point. There the dean of students was held to be a supervisor solely because he sat on a committee which made effective recommendations regarding hiring and firing.

B. The Committee on Academic Priorities and Resource Allocation.

The testimony documented the broad managerial powers possessed by the members (including faculty, students and administrators) of the Committee on Academic Priorities and Resource Allocation. Its purpose is to provide, for the first time, a long-range scale of academic and fiscal priorities for the University as a whole (A.94, 590, 593). Thus, Dean Rabinowitz, a member of the committee, testified that it is empowered to reevaluate the objectives of the University's schools, reviewing class size, staffing patterns, degree requirements, course offerings, admissions, student services and physical facilities. In addition, the committee is to review methods of raising funds, including an evaluation of tuition levels (A.592-595).

The committee is in a position to make effective recommendations regarding academic priorities and resource allocation.

tion. To carry out their responsibilities, for example, members of the committee, including faculty members, have access to University financial data (A.595). Dean Rabinowitz, in fact, saw the committee's authority in making determinations of the school's overall priorities as substantially greater than his own authority as dean (A.597-598).

Plainly, the faculty who are members of the committee are managerial employees and should have been excluded.

C. The Assistant Dean of the Belfer School, Charles Patt.

The Assistant Dean of Belfer is Charles Patt. Although Patt, like most other administrators in the University, continues to hold faculty rank, he performs managerial and supervisory duties substantially greater than those normally performed by a member of the faculty, duties which mandate his exclusion as a managerial and/or supervisory employee.

Patt, who teaches only one course, is the person at Belfer charged with the duty of overseeing the administration by various faculty members of the school's millions of dollars of research grants. Thus, Dean Komar relies on Patt to see that faculty grant proposals are in accord with government regulations and are administered properly by the faculty. Komar expects that Patt will usually correct grant proposals without coming to see him and Patt has disapproved grant budgets proposed by faculty as being in violation of government or University policy (A.1455-1458).

Patt is also in charge of grant accounting and of charging expenditures to grants (A.854-861).

In carrying out these duties, Patt "frequently has to negotiate with the individual faculty members to see that the University's interests are protected in writing budgets for grant proposals." Thus, a "frequent source of conflict" between Patt and the faculty is his refusal (once a grant has been awarded) to permit faculty to transfer funds from a supply category to a salary category, since such a transfer would prevent the University from retaining part of the funds as "overhead." Another recurrent source of "friction" between the faculty and Patt is his insistence that grant proposals include overhead, secretarial and fringe benefit items which benefit the University but diminish the funds available for the faculty member's research (A.855, 858-861).*

When Patt is not available to carry out his administrative duties, it is Dean Komar's responsibility to see that they are done. And, when Komar is away from Belfer, Patt is "definitely" left in charge of the school (A.863-864).

The Belfer Catalog lists Patt as an administrator and it is noteworthy that when Patt was elected an alternate to the

* Other of Patt's responsibilities include seeing that student curriculum requirements are fulfilled, keeping track of faculty work loads, providing liaison with the Registrar's and admissions offices, and making faculty room assignments (A.854-855, 861).

committee which is planning a University Senate, Komar stated that he did not wish Patt to serve because, among other reasons, Patt was an administrator (A.1336-1338, 1480; R.4372).

Thus, the testimony shows that Patt's duties involve an inherent conflict of interest, are managerial and supervisory in nature, and are carried out on the basis of Patt's own independent judgment under only the most cursory oversight by Komar.

D. The Board Has Improperly Disregarded Supervision of Out-of-Unit Personnel.

The Board apparently takes the position that so long as other in-unit faculty are not supervised, direction of a "non-unit employee" does not warrant exclusion (NLRB Br. 41-42).*

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- * This appears to be the position taken by the Board with respect to the chairman of the Wurzweiler Admissions Committee, Dr. Esther Lentschner, and the chairman of the Doctoral Committee at Wurzweiler, Dr. Lloyd Setleis (NLRB Br. 41-42). In addition to the important managerial role played by these chairmen in the school (for which each receives a reduced teaching load) they regularly supervise their respective committees' secretaries, and, thus, should be excluded as supervisors (A.945-949, 957-963, 1039-1040).

A similar rationale (although somehow not articulated by the Board) would treat department chairmen who exercise supervisory authority over part-time faculty and departmental secretaries as non-supervisory simply because all part-time faculty have been excluded from the unit, thus making application of Section 2(11) turn on the Board's unit determination rather than on application of the statutory language. Compare, Adelphi University, 195 NLRB 639 (1972) (part-time faculty included in the unit, but elected department chairmen excluded as supervisors because, among other things, they hired part-timers).

This approach goes beyond the so-called 50% rule whereby the Board has previously excluded faculty from professional bargaining units only if they spent more than 50% of their time supervising out-of-unit personnel.* Given the language of Section 2(11), it is not surprising that Judge Feinberg recently noted that "whether there is a legal justification for the Board's so-called 50% rule" presents a "difficult" question. See NLRB v. Mercy College 536 F.2d 544, 550 (2d Cir. 1976) (issue not determined).** Here, the Board apparently goes even further and treats any amount out-of-unit supervision as legally irrelevant in determining whether an out-of-unit supervisor will be included in a professional unit.

The supervisory definition of Section 2(11) is met if an employee possesses the authority to exercise or effectively to recommend the exercise of any one of the section's enumerated powers. The courts have ruled that it is the possession of

* This rationale may have been applied to exclusion of principal investigators in this case. See A.12, at fn. 19.

** In Boston University v. NLRB, Nos. 77-1143, 1226 and 1365 (1st Cir., April 13, 1978) the court considered and upheld the validity of the 50% rule in the context of department chairmen who reached a maximum of ten percent of total working time spent in out-of-unit supervision. The court, however, explicitly stated that "[w]e intimate no view as to the validity of the rule where the supervisory time closely approaches or exceeds 50%." (Slip op., p. 10 fn. 4.) The First Circuit's conclusion on this important issue is summarily stated, without reference to this Court's observation in Mercy College, supra, or to any case law or legislative history. We respectfully suggest for the reasons stated in the text above that this Court should reach a result different from the one reached by the First Circuit.

supervisory authority, not the percentage of time spent in exercising that authority, that is determinative.

Thus, in NLRB v. Fullerton Publishing Co., 283 F.2d 545, 550 (9th Cir. 1960), the court found an employee who worked both as an editor and as a reporter to be a supervisor, stating: "It is no help to the petitioner to urge that Fuller spent at least half of his time as a reporter, and only half of his time as a supervisor, for it is the existence of supervisory power, and not necessarily the constant continuous utilization of it, which determines whether a man is a supervisor." See, also, West Penn Power Co. v. NLRB, 337 F.2d 993 (3d Cir. 1964); NLRB v. Roselon Southern, Inc., 382 F.2d 245 (6th Cir. 1967); Arizona Public Service Co. v. NLRB, 453 F.2d 228 (9th Cir. 1971).

Nor is there any basis in the language of Section 2(11) or in its legislative history for a distinction between the supervision of unit and non-unit employees. In fact, in American Oil Company, 155 NLRB 46 (1965), the Board itself excluded as supervisors several professional employees because of their supervision of non-professional, non-unit employees.

The Board's basis for the application of the 50% rule is found in its own decision in Adelphi University where it held, despite the numerous court decisions to the contrary that

****[A]n employee whose principal duties are of the same character as that of other bargaining unit

employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over non-unit personnel. No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act." Adelphi University, supra at 644. See, also, New York University, 205 NLRB 4, 8. Cf. NLRB v. Leland-Gifford Co., 200 F.2d 620, 625 (1st Cir. 1952).

In reaching this conclusion the Board apparently relied on Westinghouse Electric Corp., 163 NLRB 723 (1967), enf'd, Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151 (7th Cir. 1970). That case involved the supervisory status of professional engineers who, throughout the year, held two sharply separate positions, one supervisory and the other not. The time spent in the non-supervisory position was a measurable period of time not closely intermingled with the supervisory functions of the other position.

In the other position, the engineers supervised non-unit employees. There is nothing in either the Board or court decision to indicate that the engineers spent 50% of their time in the actual supervision of non-unit employees. (Indeed, it may be inferred from the decisions that the engineers spent considerably less than 50% of their time supervising.) Rather, the Board based its determination of supervisory status on whether the engineers were assigned for more than 50% of the year in the supervisory position. The test, initially devel-

oped for seasonal employees, has no bearing on the amount of time an individual devotes to particular duties on a day-to-day basis. See, Greater Western Sugar Co., 137 NLRB 551 (1962).

The inconsistency of the Board's reasoning is apparent. Without more, the language of Section 2(11) mandates that individuals who supervise non-unit employees, including the chairmen of the Doctoral and Admissions Committees at Wurzweiler, who supervise secretaries, and the departmental chairmen at other schools, who supervise part-time faculty or secretaries, be excluded regardless of the quantity of time they spend in such out-of-unit supervision.

In any event, the underlying rationale of the 50% rule has been, in essence, overruled in the Supreme Court's Textron decision, supra, which held that the Board could not limit the managerial exclusion to only those managers who were in a position susceptible to conflicts of interest. In light of Textron's undermining of the 50% rule's artificial "conflict of interest" rationale, we urge the Court to reverse the Board's determination to include the chairmen in issue here.

POINT IV

THE BOARD'S TREATMENT OF REGULAR HALF-TIME FACULTY AMOUNTED TO DE FACTO RULE MAKING WITHOUT AFFORD- ING THE DUE PROCESS REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

Since 1938, the Board has recognized in a vast array of differing contexts that part-time employees who work a "regular and substantial amount of time . . . have a sufficient community of interest with full-time employees" to mandate their inclusion in full-time bargaining units.* This principle has been followed in all sectors of the economy and, in fact, in all university faculty representation cases from 1971 into 1973.**

In 1973, in a three to two decision in which then Chairman Miller and current Chairman Fanning dissented, the Board broke with this precedent of 35 years to announce in New York University, 205 NLRB 4, a new rule, applied only to faculty, that all non-tenure eligible part-time faculty would thereafter be excluded from full-time faculty units. We sub-

* Sears, Roebuck & Co., 172 NLRB 1266 (1968). See, e.g., Daily Mirror, Inc., 5 NLRB 362 (1938); Weekly Publications, Inc., 8 NLRB 76 (1938); Western Union Telegraph Co., 36 NLRB 881 (1941); Krambo Food Stores, Inc., 36 NLRB 369 (1957); Great Atlantic and Pacific Tea Co. Inc., 128 NLRB 342 (1960); Viking of Minneapolis, 171 NLRB 1155 (1968); Wisconsin Bearing Co., 193 NLRB 249 (1971); Columbia Music & Electronics, Inc., 196 NLRB 388 (1972); St. Luke's Episcopal Hospital, 222 NLRB 674 (1976); and George Junior Republic, 224 NLRB 1581 (1976).

** See, e.g., University of New Haven, 190 NLRB 478 (1971); Manhattan College, 195 NLRB 65 (1972); and Catholic University, 201 NLRB 929 (1973).

mit that when an administrative agency breaks with its long-time precedent, as the Board did in N.Y.U., in a sense the ordinary burden of persuasion on appeal of administrative agency action should be reversed. In any event, measured by that standard (or any other standard requiring close attention) the Board's action cannot stand.

In its decision granting summary judgment on the unfair labor practice charge in this case, the Board rejected the University's contention that its decision with respect to regular half-time faculty was erroneous by noting:

"[W]e find no merit in Respondent's contention that the Board contravened the Administrative Procedure Act by excluding regular part-time faculty members from the appropriate unit without first conducting a rule-making proceeding pursuant thereto. It is well established that adjudicated cases may serve as precedent, and that the Board may apply those precedents to the parties in an adjudicatory proceeding." (A. 25)

We believe that the Board misconstrues the University's argument. The University is not contending that the Board was precluded from an adjudicatory consideration of this issue so long as such adjudication was, in actuality, based on a case-by-case consideration of the facts at each institution, and, in this case, the facts respecting regular half-time faculty at Yeshiva. Rather, it is the University's position that the Board was precluded from denying the individual case-by-case

factual consideration inherent in proper adjudication while at the same time denying the due process protections inherent in rule-making; that is, from simultaneously applying an unwavering rule at Yeshiva -- without regard to the University's factual situation -- while also denying the alternative protections afforded by the requirements of rule-making under the Administrative Procedure Act. 5 U.S.C. 553 et seq.

That one or the other protection must be afforded is implicit in the Supreme Court's decision in Tevlin, supra at 294, where the Court noted that adjudication was permissible in an instance where the Board was proceeding:

"...in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company."

The issue, then, is whether the Board's adjudicatory decisions on part-time faculty can fairly be said to have been handled "in a case-by-case manner with attention to the specific character" of the particular part-time faculty relationship involved at each institution.

The Board's treatment of part-time faculty plainly divides into two stages, separated by N.Y.U., supra. After announcing in one of its earliest decisions on the issue that "absent a stipulation of the parties to the contrary, only a unit of full-time and regular part-time professional employees is

appropriate," University of New Haven, supra at 478 (emphasis added), the Board thereafter included regular part-time faculty in every unit determination prior to N.Y.U.

Then, in its decision in N.Y.U., the Board issued what was plainly intended to be, in effect, a new "rule":

"This issue has been raised before and it has consistently been resolved in favor of inclusion.

However, after careful reflection, we have reached the conclusion that part-time faculty do not share a community of interest with full-time faculty and, therefore, should not be included in the same bargaining unit.... We are now convinced that the differences between the full-time and part-time faculty are so substantial in most colleges and universities that we should not adhere to the principle announced in the New Haven case. We shall exclude all adjunct professors and part-time faculty members who are not employed in 'tenure track' positions." (New York University, supra at 6, emphasis added)

And in a footnoted comment, the Board specifically noted that its action in N.Y.U. constituted the "abandonment of the New Haven rule", implying, as soon became unmistakably clear, that the Board was now adopting what has become widely known as the N.Y.U. "rule" on part-time faculty. Id. Indeed, in its brief in this case, the Board all but admits that its current position on all manner of tenure ineligible part-time faculty at all manner of educational institutions constitutes an unvarying rule, unrelated to the specific facts of each case. Thus, the Board notes:

"The Board's present policy is to exclude all part-time faculty 'who are not employed in 'tenure track' positions'. New York University, supra, 205 NLRB at 6-7." (NLRB Br. 43, emphasis added)

And, since the Board announced its decision in N.Y.U. in July of 1973, in every unit determination question involving part-time faculty save one, the Board has excluded part-time faculty despite widely divergent campus situations and widely divergent fact patterns. Indeed, the Board has consistently applied its "rule" on part-time faculty, almost entirely without factual consideration or discussion, simply reiterating in each case its rule on part-time faculty and citing its N.Y.U. decision.*

While there can be little doubt that the Board has adopted and, indeed, admits adopting what is in effect a rule of excluding all non-tenure eligible part-time faculty, this is more than a technical violation of the Administrative Procedure Act. Such an unbending rule is not only at odds with statutory requirements, it is factually unreasonable in this case.

* See, e.g., Point Park College, 209 NLRB 1064, 1064-1065, (1974); University of Miami, 213 NLRB 634, 637 (1974); Rensselaer Polytechnic Institute, 218 NLRB 1435, 1438 (1975); Fairleigh Dickinson University, 205 NLRB 673, 675 (1973); University of Vermont, 223 NLRB 423, 425 (1976); Catholic University, 205 NLRB 130 (1973); compare, Kendall College, 228 NLRB 126 (1977), enf'd No. 77-1418 (7th Cir., Feb. 17, 1978). To the extent that Kendall College differs from the result requested herein, we submit that it should not be followed here.

First, at Yeshiva inclusion has been sought by the University not for part-time faculty generally, but only for those faculty whose regularity of service and length of employment give them a community of interest with full-time faculty. Thus, in contrast to N.Y.U., supra at 7, where the Board emphasized that it was motivated to exclude part-time faculty because such "faculty [did] not participate in the governance of the University," many of Yeshiva's regular part-time faculty participate in governance functions (A.568). Indeed, one dean testified that at his school, Erna Michael, "[t]here is absolutely no distinction in terms of meetings, participation, et cetera, between part-time and full-time people" (A.546).

A second reason for exclusion noted by the Board in N.Y.U. was that part-timers there had substantially different working conditions than full-time faculty. This was particularly the case because N.Y.U. part-timers "had no responsibilities beyond teaching and grading," while its full-time faculty were also expected to "engage in research, writing, or some other creative endeavor, to counsel students, and to participate in the affairs of this department and the University". N.Y.U., supra at 7.

At Yeshiva, on the other hand, many part-time faculty are engaged to a degree fully equivalent to full-time faculty in the above matters, including research, counselling students and participation in the affairs of their department and the Univer-

sity (A.337-338, 744-745). And, uncontroverted evidence establishes that at most of the schools of our University courses are regularly switched from part-time faculty to full-time faculty and vice versa (see, e.g., R. 2656-2659, 3943, 3946-3947). Given this sensitive interface, and the possibility of separate representation for part-timers under the Board's exclusionary rule, Chairman Fanning noted in his N.Y.U. dissent that there was a possibility of "requiring the University to bargain over the identical subject matter [here individual course offerings, selections and workload] with the collective bargaining representative of different factions of the same faculty." N.Y.U., supra at 12. Given the shifting workloads between part-time and full-time staff (and the possibility that part-timers may replace full-timers and vice versa (R.2842)), the exclusion of part-timers and most certainly the exclusion of half-timers was arbitrary, indeed, in conflict with long-standing Board precedents.

The third reason for exclusion of part-timers in N.Y.U. was the degree of comparability of rates of compensation. At N.Y.U., the Board concluded that the compensation paid N.Y.U.'s part-timers was not in any sense pro rata but was characterized by the fact that "a substantial number of [N.Y.U.'s] part-time faculty received a modest sum which corresponds to a respectable honorarium". N.Y.U., supra at 7. At Yeshiva University, however, some regular half-time faculty salaries have a "pro rata" relationship

to full-time faculty, and certainly no regular half-timer's salary was comparable to an honorarium (A.339, 575, 683-684, 1100).

The final factor cited by the Board in N.Y.U. was that tenure applied to full-time faculty alone, N.Y.U., supra at 7. Because of tenure a full-time faculty member at N.Y.U. had permanence with the institution, as opposed to the N.Y.U. part-timer's "transient" status. Id. At Yeshiva, however, regular half-time faculty by the very virtue of their classification are those faculty with an ongoing stake in the University community. Moreover, many regular half-time faculty at Yeshiva have had substantial long-time employment and de facto job security (A.572, 752; R. 3788). Beyond this, many full-time faculty, albeit eligible for tenure, will not necessarily be awarded tenure. Indeed, until tenure is awarded to them they have no more assurance of long term permanence of employment, subject to financial exigency and the like, than do part-timers.*

In sum, if the Board had, in actuality, applied the very factors it deemed determinative of the unit status of part-time faculty to the facts of Yeshiva, it should have included

* Plainly, the record in this case, unlike the one in Boston University v. NLRB, supra, reflects a significant mutuality of interest between full-time and part-time faculty. In addition, the court did not in the context of the Board's part-time exclusionary rule deal with the propriety of the Board's failure to conduct a rule-making proceeding pursuant to the APA.

the University's regular half-time faculty.*

Not only is an inflexible rule on part-time faculty inappropriate, its adoption by the Board contravenes the Board's own determination of the factual diversity of different educational institutions in just this regard. Thus, the Board previously denied rule-making on unit issues including the unit status of part-time faculty precisely because of such factual diversity,** which diversity is no less pronounced and no less persuasive today.

The question obviously arises: Why has the Board adopted the inflexible rule to exclude part-timers that it had so repeatedly disavowed as inappropriate in other circumstances? The Board concedes that one of its primary reasons for adopting a "rule" of exclusion was that the Board found exclusion the easiest way of dealing with the difficulties inherent in defining "regular" part-time faculty so as to segregate them from the more transient part-time faculty who were to be excluded:

"Our abandonment of the New Haven rule... [has] also been influenced by the Board's inability to formulate what we regard as a satisfactory standard for determining the eligibility of adjuncts in Board elections."***

* Even one of the faculty unions involved as amicus so implies and notes that "were the Board commanded to determine the most appropriate unit, the administration's argument might raise a significant issue" (AAUP Br. 38).

** NLRB Order Denying Petition, dated July 16, 1971.

*** N.Y.U., supra at 6, fn. 9; see also NLRB Br. 43, fn. 19.

The problem of determination of faculty units is not related to part-time faculty alone, however, and is certainly not a problem that would justify a blanket rule of exclusion without a rule-making procedure. In fact, answers to this very type of problem might well have been generated in a rule-making proceeding.

Indeed, so strained is the validity of the Board's adoption of an unbending unit rule for all part-time faculty at every institution that neither the of the Board's amici supports the validity of this position. Thus, the American Federation of Teachers expressly noted its opposition to a rule of exclusion of all part-time faculty at all institutions:

"...our position is not in reliance on the NLRB's test enunciated in New York University, 205 NLRB at 607. We feel the exclusion of all part-time faculty 'where not employed in a tenure track position' is unduly inflexible."
(AFT Br. 30)

Similarly, the American Association of University Professors noted its support of unit inclusion for certain part-time faculty at certain institutions, including those not tenure eligible, and its position of suggesting the NLRB "adopt a set of flexible criteria, including but not limited to, tenure eligibility" (AAUP Br. 30, 41 fn. 20).

The only detailed factual analysis of the part-time faculty issue in this case is the post-decision, retroactive

analysis attempted in the Board's brief. The issue at hand, however, is not how the Board might have considered the factual situation of the University's regular half-time faculty had the Board not adopted an unbending unit rule on part-time faculty well prior to the case. Rather, the issue is simply whether the Board lawfully adopted its unbending unit rule on part-time faculty - albeit on a de facto basis - without meeting the statutory requirements relative to due process, i.e., can the Board adopt a unit rule on part-time faculty, as it clearly did in 1973, and apply it to Yeshiva in 1977, without complying with the requirements of the Administrative Procedure Act respecting rule-making?

We submit that the Board cannot. Rather, the Board's decision on regular half-time faculty constituted the improper denial of either the specific factual consideration of case by case adjudication, or the due process requirements called for by the Administrative Procedure Act where a "rule" is to be promulgated. As such, those actions cannot be allowed to stand.

POINT V

ALL FACULTY WHO RESIGNED, RETIRED OR
WERE TERMINATED BEFORE THE ELECTION
WAS ORDERED SHOULD BE EXCLUDED.

This section of the brief is concerned with three categories of faculty: (1) Those on probationary contracts or fixed term appointments who, as of the election date, had received notice that their appointment would be terminated or not renewed at or before the end of the academic year; (2) faculty members who, as of that date, had notified the University that they intended to resign effective at or before the end of the academic year; and (3) faculty who had reached the University's mandatory retirement age, for retirement at the end of the academic year.

We submit that all these terminal faculty (and particularly those who resign) had no meaningful interest in the outcome of an election and, thus, the Board's failure to exclude them was reversible error.

The Faculty Handbook provides for the termination of probationary faculty (A.1503). Except for faculty who have served for less than one academic year, and except where the letter of appointment provides otherwise, there is a substantial period between notice of termination and actual cessation of employment. Thus, a faculty member who has taught between one and two years must be given three months notice, while a faculty member who has

taught more than two years must be notified in the first month of the academic year.

Similarly, a faculty member may generally only resign effective at the end of the academic year if he provides the University with notice by May 15 (A.1502).

Because of the long time lapse between notice of termination or of resignation and actual cessation of employment, there are at any given moment a number of University faculty in the status of terminal employees.

In university cases, the Board has ruled that terminal faculty employees are eligible to vote. See, e.g., New York University, 205 NLRB 4 (1973). These cases have followed the industrial rule established in Whiting Corporation, 99 NLRB 117 (1952), that employment status on the eligibility date and election date governs the right to vote.

The University submits, however, that the reason for the industrial rule -- the need for "endless investigations into states of mind or of future prospects" in order to determine whether an employee will in fact retain his employment status, Whiting, supra at 123 -- simply does not exist in the case of the University's faculty who have resigned. The record of this proceeding demonstrates quite clearly that such terminal faculty employees will only rarely return in the following academic year.

Thus, the University has documented that of the 55 full-time Yeshiva University faculty who have resigned or been terminated since the fall of 1971, only one has returned to the University as a member of the full-time faculty, and only four have returned with part-time status (A.1607). Based on his fourteen years in university teaching, the Union's President, Ralph Behrends, confirmed that a faculty member who has been terminated or resigned will not in fact return in the following year (A. 1342).

A terminal faculty member, in light of the virtual certainty that he will not return to the University, clearly lacks a community interest with the remaining faculty. The Board indicates in its brief that terminal faculty do share a community of interest for the few months that they remain at the University (NLRB Br. 51). But visiting faculty were excluded from the unit "because of their temporary association with Yeshiva University" (A.139-140), and part-time faculty were excluded, in part, because as non-tenured personnel they have no "permanent" ties to the University (NLRB Br. 45).

We believe that the Board is in error in its failure to develop a consistent policy regarding all faculty whose status at the University is temporary. If it excludes visiting and part-time faculty because of their temporary status, then resigning, retiring and terminated faculty should certainly be excluded

because of the virtual certainty they will not return to the University.

The Board's failure to exclude terminal faculty (particularly those who resign), in light of the exclusion of visiting and part-time faculty and of the failure of the Board's "industrial rule" to provide a reasonable standard in university cases, is plainly arbitrary and capricious and should be reversed.

CONCLUSION

For the reasons set forth above, enforcement of the Board's order should be denied and the certification should be vacated. In the alternative, a new election should be ordered. See, NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1178-1179 (2d Cir. 1968).

Respectfully submitted,

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17, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, :
Petitioner, :
and :
YESHIVA UNIVERSITY FACULTY :
ASSOCIATION, :
Intervenor-Petitioner, : No. 77-4182
v. :
YESHIVA UNIVERSITY, :
Respondent. :
----- x

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of
Respondent's brief in the above case have this day been served
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